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REPORTS
OF
Cases Heard and Determined
BY THE
SUPREME COURT
OF
SOUTH CAROLINA

VOLUME XCV.
CONTAINING CASES OF APRIL TERM, 1913.

By C. M. EFIRD,
STATE REPORTER.

Columbia, S. C.
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1914.

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AUG 6 1914

JUDGES AND OTHER LAW OFFICERS

DURING THE PERIOD COMPRISED IN THIS VOLUME.

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HON. EUGENE B. GARY.

ASSOCIATE JUSTICES.

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HON. R. C. WATTS.

HON. D. E. HYDRICK.
HON. T. B. FRASER.

CIRCUIT JUDGES.

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SECOND CIRCUIT—HON. H. F. RICE.
THIRD CIRCUIT—HON. JOHN S. WILSON.
FOURTH CIRCUIT—HON. T. H. SPAIN.
FIFTH CIRCUIT—HON. ERNEST GARY.
SIXTH CIRCUIT—HON. GEORGE WILLIAMS GAGE.
SEVENTH CIRCUIT—HON. T. S. SEASE.
EIGHTH CIRCUIT—HON. FRANK B. GARY.
NINTH CIRCUIT—HON. R. WITHERS MEMMINGER.
TENTH CIRCUIT—HON. GEORGE E. PRINCE.
ELEVENTH CIRCUIT—HON. J. W. DEVORE.
TWELFTH CIRCUIT—HON. S. W. G. SHIPP.

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HON. THOS. H. PEEPLES.

SOLICITORS.

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3d Circuit—PHILIP H. STOLL.
4th Circuit—J. M. SPEARS.
5th Circuit—W. HAMPTON COBB.
6th Circuit—J. K. HENRY.

7th Circuit—²A. E. HILL.
8th Circuit—R. A. COOPER.
9th Circuit—JOHN H. PEURIFOY.
10th Circuit—PROCTOR A. BONHAM.
11th Circuit—G. B. TIMMERMAN.
12th Circuit—³L. B. SINGLETON.

CLERK OF THE SUPREME COURT.

ULYSSES R. BROOKS.

¹Resigned June 9, 1913. ²Qualified January 20, 1913. ³Appointed February 4, 1913.

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DURING YEAR 1912.

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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
Supreme Court of South Carolina.

**Justices of the Supreme Court During the Period Comprised in
this Volume.**

HON. EUGENE B. GARY, CHIEF JUSTICE.
*HON. C. A. WOODS, ASSOCIATE JUSTICE.
HON. D. E. HYDRICK, ASSOCIATE JUSTICE.
HON. R. C. WATTS, ASSOCIATE JUSTICE.
HON. T. B. FRASER, ASSOCIATE JUSTICE.

8557

PARRY v. SOUTHEASTERN LIFE INSURANCE CO.

INSURANCE—WAIVER—FORFEITURE.—Where a policy of insurance, according to its terms and the receipt given for the premium, is forfeited by failure to pay the note given for the first premium when due, such forfeiture is not waived by the insurer writing after default, the following letter to the insured: "We are so disappointed at not hearing from you about premium note and interest past due since June 1st, that we are enclosing self-addressed envelope for reply from you saying why you have not attended to same. If we can help you by accepting part cash and extending note or make it easier for you in any other way please be free to express your views and we will give you prompt reply," which was not answered by insured.

Before MEMMINGER, J., Newberry, November, 1912.
Reversed.

*Resigned, June, 1913.

• Action by Julia O. F. Parry against Southeastern Life Insurance Company. Defendant appeals.

Messrs. Haynsworth & Haynsworth, Hunt, Hunt & Hunter, for appellant, cite: *Failure to pay the note avoided the policy*: 72 S. C. 216; 104 U. S. 252. *Offer not accepted does not operate as an estoppel*: 96 U. S. 572; 96 Pac. 522; 60 A. R. 24; 29 S. E. 41; 42 At. 513; 128 N. W. 462; 76 S. E. 592; 93 S. C. 88.

Mr. Fred. H. Dominick, contra, cites: *As to forfeiture*: 54 S. C. 601; 96 U. S. 242. *As to waiver of forfeiture*: 78 S. C. 443; 36 S. C. 273; 52 S. C. 228; 70 S. C. 303; 75 S. C. 263, 320; 78 S. C. 402; 25 Cyc. 871; 57 S. C. 370; 78 S. C. 444; 81 N. Y. 410; 90 S. C. 175.

May 28, 1913. The opinion of the Court was delivered by

MR. CHIEF JUSTICE GARY. This is an action on a policy of insurance.

On the 10th of March, 1907, the defendant issued a policy of insurance on the life of J. W. Parry, wherein his wife, the plaintiff, was named as the beneficiary.

One of the conditions contained in the policy was as follows: "Failing to pay when due any renewal premium or installment thereof, or any note or other obligation given as a lien against this policy, will render this contract null and void." * * *

The receipt given by the company for the premium contained this clause: "This receipt is subject to the conditions of any and all notes which have been given or may be given for the amount of said premium, or any part thereof."

The insured delivered to the company his promissory note whereby he promised to pay three months after the date thereof, twenty-three and 40-100 dollars, being the premium on said policy, due March 15, 1907. Said policy including

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April Term, 1913.

all conditions therein for surrender or continuance as a paid-up term policy, to be null and void on the failure to pay said note at maturity.

The insured failed to pay said note, and on the 17th of July, 1907, the company wrote the following letter to him:

"We are so disappointed at not hearing from you about premium note and interest of \$23.88 past due since June 1st, that we are enclosing self-addressed stamped envelope for reply from you saying why you have not attended to same.

"If we can help you by accepting part cash and extending note, or make it easier for you in any other way, please be free to express your views, and we will give you prompt reply."

The insured made no response.

The case was heard by his Honor, the presiding Judge, without a jury, and he found as a fact that "a conclusive case of waiver of forfeiture for nonpayment at maturity of premium note is established," and accordingly rendered judgment in favor of the plaintiff for the amount of the policy, whereupon the defendant appealed.

The letter was the only testimony introduced by the plaintiff to show that there was waiver of the right to insist upon the forfeiture.

The question presented by the exceptions is whether there was any evidence tending to show waiver.

The authorities cited by the appellant's attorneys unquestionably sustain the proposition, that there was a forfeiture of the policy when the insured failed to pay the note at maturity.

There is nothing in the letter manifesting an intention on the part of the company to waive the forfeiture. It was the intention of the company that the letter should be prospective in its operation; that it was merely intended to afford the insured the opportunity of entering into negotiations that might culminate in a waiver of the forfeiture if the insured complied with the terms and conditions upon which they

might agree. It cannot be successfully contended that the ignoring of the letter by the insured was as beneficial to him as if the parties had entered into an agreement and had performed the conditions upon which the forfeiture was to be waived.

Judgment reversed and a new trial granted.

8558

COLCLOUGH v. BRIGGS.

1. **PLEADINGS—DEMURRER—MOTION TO MAKE DEFINITE.**—Where the allegations in a complaint are so indefinite and uncertain as to leave it doubtful if the pleader intended to allege the grantor intended to bind himself individually or the estate of which he was trustee, by the covenant of warranty, the remedy is by motion to make the complaint definite and certain and not demurder.
2. **DEEDS—BREACH OF WARRANTY.**—Where there is a breach of warranty and the grantor intended to warrant the title individually, his estate is liable for damages arising from such breach.
3. **AN EXCEPTION** alleging error in a ruling not shown by the record to have been made is not well taken.

Before ERNEST GARY, J., Clarendon, February, 1913.
Affirmed.

Action by S. M. Colclough against A. J. Briggs, R. B. Smyth, Mike Powell and E. Smyth, as executors of R. R. Briggs, on the following complaint:

(1) "That the plaintiff is a resident of Ridge Spring, Saluda county, State aforesaid.

(2) "That the defendants are the duly qualified executors of the estate of R. R. Briggs, deceased, late of the county and State aforesaid; that A. J. Briggs resides at Summer-ton, county and State aforesaid; that Mike Powell resides at Newman, State of Georgia; that E. A. Smyth resides at Blacksburg, State of Virginia; that R. B. Smyth is insane

and is confined in some sanitarium beyond the limits of this State.

(3) "That during the year 1904, R. R. Briggs, as the trustee for E. M. Briggs, and as such trustee, the owner in fee, conveyed by warranty deed a lot of land in the town of Summerton, county and State aforesaid, to the plaintiff herein; that the description of said lot of land is as follows, to wit: Situate on the east side of Cantey street, measuring thereon one hundred and twenty feet, and measuring in depth on its southern line three hundred and thirteen feet; on its northern line two hundred and forty-two feet, and having a width on its back line of seventy-eight feet; bounded on the north by lot of W. H. Shirer; east by the right of way of the Northwestern railroad; south by land of E. M. Briggs, and on the west by Cantey street.

(4) "That under and by virtue of the conveyance and title to plaintiff as aforesaid, R. R. Briggs, as trustee as aforesaid, and as such trustee the owner in fee, bound himself and his heirs, executors and administrators, to warrant and forever defend, all and singular, the premises aforesaid unto the said plaintiff, against his heirs and all other persons lawfully claiming or to claim the same, or any part thereof.

(5) "That during the year 1908, the Northwestern R. R. Co. of South Carolina, commenced an action in the Court of Common Pleas for the county and State aforesaid, the legal object and purpose of said action being to oust and recover of plaintiff herein, a part or portion of the lot of land aforesaid; that said action was determined by a decision rendered by the Supreme Court of the State aforesaid in the month of October, 1911; that under and by virtue of said action the aforesaid railroad company ousted and recovered of this plaintiff a part or portion of the lot of land sold to the said plaintiff by R. R. Briggs, as trustee, and as such trustee the owner in fee as aforesaid; that under and by virtue of said

action the legal title of plaintiff to the lot of land as aforesaid was put in issue.

(6) "That R. R. Briggs, as trustee, and as such trustee the owner in fee as aforesaid, was duly and legally and properly vouched and notified of the aforesaid action, and required to come in and defend said action; that said R. R. Briggs, as trustee, and owner in fee as aforesaid, refused to expend any money in the direction of defending the title of the plaintiff to the lot of land as aforesaid, the title to said lot having been brought into issue by reason of the above action.

(7) "That during the month of April, 1910, E. M. Briggs became the owner in fee of all the property, real and personal, and died and R. R. Briggs as aforesaid, became the heir and devisee, of the said E. M. Briggs; that R. R. Briggs died in the month of October, 1910, and thereafter, the above defendants duly qualified as the executors of the estate of the said E. M. Briggs and are now the duly qualified executors as aforesaid.

(8) "That for the purpose of defending the title to the lot as aforesaid, in the action as aforesaid, the plaintiff has expended the sum of four hundred and fifty-seven dollars and twenty cents; that on the fifth day of September, 1911, plaintiff filed a duly sworn to claim with the above defendants for the said sum of four hundred and fifty-seven dollars and twenty cents, said claim having been filed within the twelve months allowed by statute to representatives of the estate of deceased persons to settle claims against said estate; that although more than twelve months have elapsed since the defendants qualified as executors of the estate of R. R. Briggs, and defendants refuse to pay the claim aforesaid.

"Wherefore, plaintiff demands judgment against the defendants for the sum of four hundred and fifty-seven dollars and twenty cents and the costs of this action."

Rep.]

April Term, 1913.

The defendants appeal on the following exceptions:

First. "That his Honor erred, it is respectfully submitted, in overruling the demurrer when it appears upon the face of the complaint that the alleged warranty was given by R. R. Briggs, as trustee, his *cestui que trust* being the real party in interest and for whom the alleged warranty was given, and the estate of the latter is, therefore, liable, if any-one, and there is a defect of parties defendant.

Second. "That his Honor erred, it is respectfully submitted, in not holding that if the plaintiff has any cause of action it is for the breach of an alleged warranty or covenant, to be measured in damages, and there are no facts stated upon which any damages could be based.

Third. "That his Honor erred, it is respectfully submitted, in holding that the defendants are liable for money expended by plaintiff in defending a certain lawsuit, when, as a matter of law, if the plaintiff has any claim against defendant's testator the measure of damages is the value of the property lost at the time of alienation, with legal interest from the time of eviction, and it is respectfully submitted that there are no facts alleged for the recovery of any such damages."

Messrs. Davis & Weinberg, for appellants, cite: *Defendant vouched is not required to defend*: 1 Hill 27; 2 Brev. 171; 59 S. C. 454. *Measure of damages in breach of warranty*: Code 1912, 3536; 43 S. C. 29; 46 S. C. 551; 60 S. C. 526; 82 S. C. 70.

*Mr. J. J. Cante*y, contra, cites: *Complaint does not show defect of parties defendant*: 72 S. C. 40; 89 S. C. 556. *Remedy is motion to make definite*: 50 S. C. 310; 63 S. C. 525; 68 S. C. 567; 70 S. C. 276. *The warrantor and his heirs are liable*: 59 S. C. 458; 154 N. C. 61.

May 28, 1913. The opinion of the Court was delivered by

MR. CHIEF JUSTICE GARY. This is an action for damages, alleged to have been sustained by the plaintiff, on account of a breach of the warranty in the deed described in the complaint.

The defendants demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. His Honor, the Circuit Judge, overruled the demurrer and the defendants appealed.

In order to understand the questions involved, it will be necessary to set out the complaint and the exceptions, in the report of the case.

We will consider the exceptions in regular order:

First Exception. Paragraph four of the complaint is indefinite and uncertain, in that it fails to allege clearly, whether R. R. Briggs intended to bind himself individually

or the trust estate, by the covenant of warranty
1 therein mentioned. The said section on the one hand, alleges, that he bound himself, his heirs, executors and administrators, to warrant and forever defend the premises, against his heirs, etc., while, on the other hand, it alleges, that he was acting as trustee in warranting the title. In such a case the remedy is not by demurrer, but by a motion to make the complaint definite and certain.

Second Exception. The complaint alleges a breach of the covenant of warranty. If R. R. Briggs intended to
2 warrant the title individually (and as we have shown, there are allegations to that effect), then his estate is liable for damages arising from such breach.

Third Exception. This exception cannot be sus-
3 tained, for the reason that there is nothing in the record, showing that his Honor made the ruling mentioned in the exception.

Judgment affirmed.

8559

DODD v. SPARTANBURG RAILWAY, GAS AND ELECTRIC CO.

1. **OPINION EVIDENCE.**—After stating the facts, a witness may give his opinion as to whether persons standing on a crossing could hear the gong of a trolley car while watching a freight train passing near.
2. **EVIDENCE.**—Error in the admission of evidence will not be considered where similar evidence was brought out without objection.
3. **CONTRIBUTORY NEGLIGENCE.**—An infant under seven years is incapable of committing contributory negligence.
4. **PUNITIVE DAMAGES.**—Evidence that a trolley car was run rapidly over a dangerous crossing, an intersection of three streets, where school children were accustomed to cross, where the conductors have been instructed to stop the cars and where there was a signboard "Cars Stop Here," that the crossing was dangerous, and the car was running rapidly, will support punitive damages.

Before FRANK B. GARY, J., Spartanburg, Fall term, 1912.
Affirmed.

Action by Willie Dodd, by guardian, against Spartanburg Railway, Gas and Electric Company. Defendant appeals on the following exceptions:

1st. "In allowing the witness, W. C. Gash, against the objection of the defendant, to testify as to a matter of opinion and to answer the following question: 'With a freight train going right down by there, and those children standing there looking at the freight train, do you think they could have heard the gong?' The error being, as it is respectfully submitted, that this was altogether a matter of opinion, and allowed the witness to give his opinion on one of the material points in the case.

2d. "In refusing to grant the motion of the defendant for a nonsuit as to the cause of action for punitive damages. The error being, as is respectfully submitted, that there was no evidence tending to prove any wilfulness or wantonness

or such recklessness as would warrant a jury in concluding that the defendant was wilful or wanton.

3d. "In refusing the defendant's motion to direct a verdict to be rendered in favor of the defendant as to the cause of action for punitive damages. The error being, as is respectfully submitted, that there was no evidence tending to prove any wilfulness or wantonness or such recklessness on the part of the defendant as warrants the submission of this issue to the jury.

4th. "In charging and instructing the jury in reference to the cause of action for punitive damages as follows: 'I charge you, furthermore, in determining whether or not this defendant was wilful or reckless or guilty of such negligence as amounted to that, it is your duty to consider what the circumstances were. As negligence is a relative term, what would be negligence under one set of circumstances might not be under another.' The error being, as it is respectfully submitted, that by this charge his Honor in effect instructed the jury that they could render a verdict against the defendant for punitive damages, even though the defendant might have been guilty only of negligence. Further, that by this charge, his Honor in effect instructed the jury that the same act might be wilful, or wanton, or negligent. Whereas, it is respectfully submitted, the same act cannot be both wilful or wanton or at the same time negligent.

5th. "In charging and instructing the jury at the request of the plaintiff as follows: 'A driver or motorman, when operating his car on a street where he has reason to expect the presence of children, must exercise a high degree of watchfulness, and if he sees, or by the exercise of ordinary care could see a child of tender years on or near the track, he is not entitled to act on the assumption that such child will get off or stay off the track, but must at once use all reasonable efforts to avoid injuring him, and, if necessary, use all reasonable means to stop it in time to avoid injury, and if he fails to do so, the company is liable for resulting

damages.' The error being, as it is respectfully submitted, that in so charging his Honor eliminated from consideration of the jury the question of the capacity and intelligence of the child, and also eliminated the question as to whether or not a reasonable man would have thought that the child was not near enough to the track to be in danger, and allowed the jury to find a verdict against the defendant, even though the evidence might disclose that the child was of sufficient capacity and intelligence to understand and appreciate danger, and even though a reasonable man might have thought that the child was not in a place of danger.

"The error further being, as is respectfully submitted, that this was a charge upon the facts, contrary to the provisions of section 26, article V of the Constitution, and instructed the jury, as matter of fact, what degree of care a motorman should exercise and what his duty was in case he saw a child of tender years on or near the track. The error further being that by this charge his Honor placed upon the defendant the duty of exercising a high degree of care; whereas, it is respectfully submitted, a defendant under the circumstances supposed is only called upon to exercise reasonable care.

6th. "Because his Honor erred in charging as follows: 'If the employee sees an infant of very tender years on its track it is its duty to do what it should do, and, if necessary, to stop. That does not mean when he sees an infant at some distance he must stop. He is obliged to commence at once to give warning, it may be by ringing the bell, or by putting on brakes to avoid injuring that child, and, if it is necessary, he must stop.' The error being, as is respectfully submitted, that his Honor in so charging upon the facts contrary to the provisions of section 26, article V of the Constitution, and instructed the jury as to what acts the motorman should have done upon the supposed circumstances to prevent an injury; whereas, it is respectfully submitted that it was a question entirely for the jury to say whether or not any act

or acts of the defendant or its motorman was a negligent act.

7th. "Because it is respectfully submitted that his Honor erred in refusing to charge the defendant's fourth request, to wit: 'The evidence in this case does not warrant a verdict to be rendered against the defendant company for punitive damages.' The error being, as is respectfully submitted, that there was no evidence in the case showing any conscious act, or failure to act, on the part of the agents of the defendant which brought about the injury; on the contrary, the evidence shows that the agents of the defendant company began to take precautions to prevent the alleged injury as soon as the motorman saw the child was in danger, and that the injury was not caused by any wilfulness, wantonness or recklessness on the part of the defendant.

8th. "Because his Honor erred in instructing the jury in substance that they could find a verdict for actual damages, provided they concluded the defendant was guilty of negligence, and could also at the same time and for the same act find a verdict for punitive damages if they find the defendant was guilty of wilfulness or wantonness.

"The error being, as is respectfully submitted, that the same act cannot be both negligent and wilful and wanton, and his Honor should have instructed the jury that if the act of the defendant was negligent, a verdict for punitive damages could not be rendered, and that if the conduct of the defendant was wilful or wanton a verdict for negligence could not be rendered."

Messrs. Sanders & DePass, for appellant, cite: *There is no evidence of wilfulness*: 90 S. C. 442; 60 S. C. 67; 82 S. C. 92; 87 S. C. 316. *Negligence is never equivalent of wantonness*: 61 S. C. 170; 64 S. C. 494; 68 S. C. 98; 78 S. C. 329; 81 S. C. 32; 69 S. C. 116; 91 S. C. 78. *Court should not state what facts would constitute negligence*: 83 S. C. 328.

Rep.]

April Term, 1913.

Messrs. John Gary Evans, and Nichols & Nichols, contra.

May 28, 1913. The opinion of the Court was delivered by

MR. CHIEF JUSTICE GARY. The allegations of the complaint, material to the questions presented by the exceptions, are as follows:

"That on or about the — day of October, A. D. 1911, the plaintiff, with other school children, were on their way from school, and it became necessary to cross the tracks of the defendant company to reach plaintiff's home in said city, and that while plaintiff was on said track, the defendant caused its trolley car to approach the crossing and the place, where plaintiff was standing at an unlawfully high rate of speed and without notifying the plaintiff, although she was in full view of the motorman running said car, wilfully, wantonly, recklessly, negligently, and in utter disregard of the rights of plaintiff, caused the said car to run into and collide with the body of plaintiff, knocking her violently to the ground, bruising her body, filling her with intense fright, and shocking her nervous system to her great damage in the sum of five thousand dollars."

The defendant denied the allegations of negligence and recklessness, and set up the defense of contributory negligence and assumption of risk.

The jury rendered a verdict in favor of the plaintiff, for two hundred dollars actual damages, and for two hundred dollars punitive damages.

The defendant appealed upon exceptions, which will be reported.

First Exception. The record shows that the question raised by this exception thus arose, during the examination of W. C. Gash, a witness for the plaintiff:

By John Gary Evans, Esq.: "Would it be possible for anyone, standing where those children were, with a freight

train running on that track, to hear that little gong,
1 if a locomotive was pulling the freight train? I
could hear the train going down rumbling. What
kind of train was that? Just a freight train.

Judge Gary: "I think it is a matter of common knowledge that all freight trains are noisy.

"Will you state, under the circumstances there, whether it would have been possible, under those conditions, for those children to have heard the gong?

Judge Gary: "I rule that having given the facts to the jury, he can then express his opinion as to whether or not it could have been heard." Objection by C. P. Sanders, Esq., on the ground of opinion evidence.

"With a freight train going down right by there, and those children standing there, looking at the freight train, do you think they could have heard the gong? I don't think they could have heard it."

The sole objection to the testimony was on the ground, that it was opinion evidence. The exception, however, assigns error in "that this was altogether a matter of opinion, and allowed the witness to give his opinion, on one of the material points of the case." Waiving the objection that the first ground was too general, and that the second ground is not properly before this Court for consideration, as it was not urged upon the trial in the Circuit Court, the exception can not, however, be sustained.

The surroundings could not be reproduced, so as to afford the jury the same opportunity of forming a correct opinion, as when viewed by the witness. The ruling of his Honor, the presiding Judge, is fully sustained by the case of *Easler v. Ry.*, 59 S. C. 311.

There is still another reason, why the exception
2 can not be sustained, to wit: when a similar question
was propounded to the witness, it was answered without objection.

The next question that will be determined is, whether the plaintiff, who was an infant under seven years of age, at the time of the injury, was subject to the defense of contributory negligence.

In the case of *Tucker v. Buffalo Mills*, 76 S. C. (cited with approval in *Goodwyn v. Columbia Mills Co.*, 80 S. C. 349), the Court held, that an infant between seven and four-

3 mitting contributory negligence or trespass, and that it was incumbent on the party alleging such negligence or trespass, to overcome the presumption of incapacity; and that if the facts were susceptible of only one inference, it was to be drawn by the Court, otherwise by the jury. In that case the Court said: "The charge was based upon the well known fact, in reference to the capacity of infants to commit crime, a rule founded in deep knowledge and experience, with reference to the power of infants to discern between right and wrong, and has the support of a number of cases in other jurisdictions." The rule as to the capacity of a child to commit crime is thus stated in 1 Bishop on Criminal Law, section 368: "The period of life at which a capacity for crime commences, is not susceptible of being established by an exact rule, which shall operate justly in every possible case. But on the whole, justice seems best promoted by the existence of some rule. Therefore, at the common law, a child under seven years, is conclusively presumed incapable of committing any crime. Between seven and fourteen, the law also deems the child incapable; but only *prima facie* so; and evidence may be received to show a criminal capacity. The question is whether there was a guilty knowledge of wrongdoing. Over fourteen, infants, like all others, are *prima facie* capable; and he who would set up their incapacity must prove it."

This rule is recognized in 16 Enc. of Law 312, and 22 Cyc. 623-6.

The next question for consideration is, whether there was any testimony tending to show, that the plaintiff was entitled to punitive damages.

Without going into details, it is sufficient to state that there was a signboard at the crossing upon which was written: "Cars Stop Here;" this crossing, was used by the school children; it was at the junction of three streets; conductors had been instructed to stop their cars at that crossing; witnesses testified that the crossing was very dangerous. It, therefore, can not be successfully contended that there was no testimony tending to show, that the plaintiff was entitled to punitive damages.

When the other questions presented by the exceptions are considered in connection with the entire charge, it will be seen that they can not be sustained.

Judgment affirmed.

8560

THOMPSON v. THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES.

1. **INSURANCE—PROOFS OF DEATH.**—Where an insurer in answering a complaint on the policy admits the death of the insured and its liability, but alleges it does not know to whom the proceeds are due, it is not necessary to prove proofs of death were made.
2. **IBID.—ASSIGNMENT OF POLICY.**—Where an insured in his lifetime complies with the requirements of the policy as to assignment, and delivers it to the assignee with a note to the insurer to indorse the assignment on the policy, who forwards both papers to the insurer, who receives them before the death of the insured, but does not enter the assignment until after his death, but before notice thereof, the rights of the assignee are paramount to those of the first beneficiary named in the policy. An insurance policy may be transferred by parol.
3. **PARTIES—EXECUTOR—ADMINISTRATOR.**—The Court will not require an executor or administrator to be made a party defendant where such requirement would serve no useful purpose.

Before SPAIN, J., Richland, Spring term, 1912. Affirmed.

Action by Richard A. Thompson against The Equitable Life Assurance Society of the United States. Defendant appeals.

Messrs. Melton & Belser and R. E. Carwile, for appellant, cite: *Proof of death is necessary*: 60 N. Y. 169; May on Ins., sec. 562; Bliss on Life Ins. 412. *What constitutes an assignment*: 65 N. W. 501; 82 N. W. 535. *Endorsement was not pure ministerial act*: 55 So. 841; 171 N. Y. 616; 109 Am. St. R. 283; 88 N. W. 606.

Mr. Frank G. Tompkins, contra, cites: *Company waived proof of loss*: 29 S. C. 560; 25 Cyc. 885. *An assignment may be treated as an attempt to change beneficiary*: 2 Cooley's Briefs on Ins. 1097, 1104; 178 Ill. 202; 59 N. Y. Sup. 540. *Beneficiary has no vested right where right is given to change*: 4 Cooley's Briefs 3756; 64 L. R. A. 458; 56 Am. Dec. 742; 58 S. C. 280; 118 Wis. 527; 88 Ala. 241; 161 Mass. 58; 59 Minn. 39; 17 L. R. A. 447; 17 Ency. 93. *Endorsement of change of beneficiary is a mere ministerial act by insurer*: 9 L. R. A. 524; 77 S. C. 299; 56 Am. St. R. 319; 4 L. R. A. 282; 150 S. W. 871.

May 28, 1913. The opinion of the Court was delivered by

MR. CHIEF JUSTICE GARY. This is an action on a policy of life insurance.

By consent of the parties to the action, his Honor, the Circuit Judge, heard the case without a jury, and rendered judgment in favor of the plaintiff, for the amount of the policy, whereupon the defendant appealed.

The Circuit Judge thus stated the facts:

"This is an action brought for the purpose of recovering \$1,000 on an insurance policy and for all additional sums due thereon. The complaint alleges that the insured, Joseph J. Thompson, assigned the policy to his brother, Richard A. Thompson, as beneficiary thereof or as assignee; that the said Joseph J. Thompson is dead, and that his brother, Richard A. Thompson, is entitled to recover the money due under the policy.

"The defendant admits that the policy was delivered to the said Joseph J. Thompson, and that he is dead; admits that the policy was endorsed, as required by said policy, to Richard A. Thompson, but contends that it was done through misapprehension of its officers, as the policy did not reach them, before the death of the said Joseph J. Thompson; admits that they retained possession of the said policy, for the benefit of the person or persons entitled thereto. I find the following facts: That the defendant insured the life of Joseph J. Thompson for the sum of \$1,000, and that the policy was duly delivered to him, and that the money was made payable to the executors, administrators, or assigns of the said Joseph J. Thompson, and the policy contained the following provisions:

" 'Promises to pay at the home office of the society, in the city of New York, to Joseph J. Thompson, of Georgetown, county of Georgetown, State of South Carolina, herein called the insured, on the twenty-ninth day of December, nineteen hundred and twenty-eight, if the insured be then living, or upon receipt at the said home office of due proof of the prior death of the insured, to the executors, administrators, or assigns, of said Joseph J. Thompson, beneficiary, with the right of revocation, one thousand dollars, less any indebtedness, thereon to the society and any unpaid portion of the premium for the current year upon surrender of this policy properly receipted. Change of Beneficiary.—When the right of revocation has been reserved, or in the case of the death of any beneficiary under

either a revocable or irrevocable designation, the insured, if there be no existing assignment of the policy, made as herein provided, may, while the policy is in force, designate a new beneficiary with or without reserving right of revocation by filing written notice thereof at the home office of the society, accompanied by the policy for suitable endorsement thereon. Such change shall take effect upon the endorsement of the same on the policy by the society. If any beneficiary shall die before the insured, the interest of such beneficiary shall vest in the insured.

“ ‘No assignment of this policy shall be binding upon the society unless it be filed with the society at its home office. The society assumes no responsibility as to the validity of any assignment.’

“That on the 18th day of August, 1910, Joseph J. Thompson delivered said policy to his brother, Richard A. Thompson, along with the following paper :

“ ‘Declaration. Georgetown, S. C., August 18, 1910. The Equitable Life Assurance Society of the United States of America, New York, N. Y. Gentlemen: Policy No. 1580047, \$1,000, J. J. Thompson.

“ ‘I hereby and herewith authorize and request you to assign the above policy No. 1580047, issued in my name on the 29th day of December, 1908, to my brother, Richard A. Thompson, as the sole beneficiary in the event of my death. His address is Georgetown, South Carolina.

“ ‘Witness my hand and seal this 18th day of August, A. D. 1910. Joseph J. Thompson.

“ ‘Witnesses: St. J. Tucker, T. B. Dennison.’

“That in accordance with instructions, the said policy and request was mailed to the defendant and they reached the said home office on the 22d of August, 1910; that on the 19th day of August, 1910, the said insured died, and on the 24th day of August, 1910, the name of Richard A. Thompson was endorsed on said policy as beneficiary. That the said insured intended that the legal title to said policy should

vest in his said brother, and that proof of death was waived by said defendant."

The first assignment of error, is because there was a failure to furnish proofs of the death of the insured, before the commencement of the action.

The Circuit Judge overruled this defense, on the ground that the answer of the defendant, admitted the death of the insured, and also admitted its liability, but alleged

1 that it did not know to whom to pay the money,—whether to the plaintiff or the representatives of J. J. Thompson's estate.

We do not deem it necessary to cite authorities to show that the exceptions raising this question can not be sustained.

The next question for consideration is, whether there was error on the part of the Circuit Judge, in ruling, that the delivery of the policy, together with the paper called

2 a "declaration," by the insured to Richard A. Thompson, was effectual as an assignment of the policy.

It appears upon the face of the policy, that there was a compliance with the requirements thereof, in regard to its assignment.

When this fact appeared, it was incumbent on the insurance company, to satisfy the Court, that there were good reasons why the assignment should be declared a nullity. It undertook to do this, by proving that the endorsement was made, after the death of the insured, and before it had notice of such fact. It failed to adduce any testimony tending to show, that its rights would be prejudiced if the endorsement was not declared to be null and void. On the contrary, it appears from the admitted facts, that the defendant has no interest in the proceeds of the policy, except practically, as a stakeholder; for, as just stated, the answer admits its liability and that it is holding the policy, because it does not know, whether payment should be made to the plaintiff or to

the representatives of the insured's estate. Therefore, there is no equitable reason, why the Court should grant the defendant relief, by setting aside the endorsement.

There is another reason, why the Court should refuse to grant the defendant relief, in this respect. Even if it should be held, that there was a failure to comply with the requirements of the policy, in regard to the assignment thereof, the rights of the plaintiff, whether regarded as legal or equitable, are paramount to those of the executor or administrator of J. J. Thompson's estate. As between the plaintiff and the representatives of the insured's estate, the delivery of the policy to Richard A. Thompson, with the intention that the legal title should vest in him as found by the Circuit Judge, had the intended effect. A policy of insurance, like any other chose in action, may be transferred, even by parol. *Barron v. Williams*, 58 S. C. 280; *N. Y. Life Ins. Co. v. Black*, 56 Am. Dec. (Md.) 742.

A failure on the part of the insured to comply with the requirements of the policy, does not defeat the rights of the assignee,—whether legal or equitable—to the proceeds of the policy where they are paramount to those claimed in behalf of another.

In the present case there can be no doubt, that the rights of the plaintiff, are paramount to those of the insured's estate, and there is no good reason, why this Court should grant relief to the defendant, that would be of no practical benefit to it, but would only delay the plaintiff in the collection of the amount due him, under the policy.

If the insured had previously assigned the policy, Richard A. Thompson would not be entitled to the proceeds; nor would he be entitled to the proceeds, if a beneficiary had been named when the policy was delivered to him, unless there was a change of the beneficiary in the manner provided by the policy. *Holder v. Ins. Co.*, 77 S. C. 299; *Deal v. Deal*, 87 S. C. 395.

The executor or administrator of the insured, however, does not stand upon higher ground than the insured, and any act that would estop him would be binding upon them.

As the delivery of the policy, together with the writing executed by the insured, empowering the insurance company to make the necessary changes, so as to assign it to Richard A. Thompson, would be binding upon the insured if he were now living, it also estops his representatives from claiming the proceeds.

The cases of *Fogle v. Church*, 48 S. C. 86, and *Grant v. Poyas*, 62 S. C. 426, show that the Court will not

3 require an executor or administrator to be made a party, when such requirement would subserve no useful purpose.

These views practically dispose of all the exceptions.

Judgment affirmed.

8561

LOGAN v. STANLEY.

MUNICIPAL ELECTORS—REGISTRATION—CITIES AND TOWNS—STATUTES.—

Any citizen of a city or town registered to vote at a general municipal election may vote on that registration at any intervening special election. The 20 day registration provided by sec. 221 of Code of 1912 before special elections is supplemental to the general registration. The terms of the certificate of registration as provided in sec. 225 of Code of 1912, cannot govern the construction of sec. 221.

Petition in the original jurisdiction of this Court by George P. Logan for writ of injunction against Charles C. Stanley *et al.*, commissioners of election, and Allen Jones, Jr., and others, as managers of election, for the city of Columbia.

Mr. R. H. Welch, for petitioner.

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April Term, 1913.

Mr. H. N. Edmunds, contra.

May 28, 1913. The opinion of the Court was delivered by

MR. JUSTICE WOODS. The petition states the facts, and the sole question of law involved is whether the qualified electors of the city of Columbia and the town of Shandon are entitled to vote under the general municipal registration at the special election, mentioned in the petition, to be held on 3 June, 1913, or whether they should be excluded from voting unless they register under the statutory provision for registration for special municipal elections.

The question arises under the following sections of the Code of 1912:

220. "Every male citizen of this State and of the United States of the age of twenty-one years and upwards, having all of the qualifications mentioned in section 200, and who has resided within the incorporate limits of any incorporated city or town in this State for four months previous to any municipal election, and has paid all taxes due and collectible for the preceding fiscal year, and who has been registered as hereinafter required, shall be entitled to vote in all municipal elections of his city or town.

221. "Ninety days before the holding of a regular election in any incorporated city or town in this State the mayor or intendant thereof shall appoint one discreet individual, who is a qualified elector of such municipality, as supervisor of registration for such city or town, who shall hold office for the term of two years or until his successor has been appointed and qualified, and who shall receive as compensation for his service one dollar per day for each day actually engaged in the discharge of his duties, to be paid by the town or city, whose duty it shall be to register all qualified electors within the limits of the incorporated city or town. The names of all qualified electors of such municipality shall be entered in a book of registration, which, at least one week

before the election, and immediately after the holding of the election, shall be filed in the office of the clerk or recorder of such city or town, and shall be a public record, open to the inspection of any citizen at all times: *Provided*, That twenty days prior to any special election to be held as aforesaid the books of registration shall be opened for the registration of the names of the qualified electors therein, and shall remain open for a period of ten days: *Provided*, That in cities of over fifty thousand inhabitants there shall be appointed three supervisors, who shall represent different political parties or factions of parties. Immediately preceding any municipal election to be held in any incorporated city or town in this State, the supervisor or supervisors (as the case may be) shall prepare for the use of the managers of election of each polling precinct in such city or town a registration book or books for each polling precinct in such city or town, containing the names of all electors entitled to vote at such polling precinct at said election."

In *Bray v. Florence*, 62 S. C. 57, the Court held that the requirements of the Constitution that "the General Assembly shall provide for the registration of all voters before each election in municipalities" refers to general and not to special municipal elections.

The meaning of the statute is obscure and the point is not free from difficulty. The statute gives two opportunities for registration: one, the general municipal registration first provided for in section 221, and the other a special registration to be opened twenty days before any special election for ten days.

We think the better construction is that the special registration for special elections was intended to supplement the regular registration in order that those who are qualified, but not duly registered since the last general election, may not be deprived of the right to vote at special elections. There is nothing in the statute clearly indicating a purpose to deny the right to vote at special elections under the gen-

eral municipal registration, but, on the contrary, section 220 confers on every citizen otherwise qualified, "who has been registered as hereinafter required," the right to vote "at all municipal elections of his city or town." It follows that when a citizen avails himself of either of the opportunities of registration "hereinafter provided for" he has complied with the law.

These considerations are controlling against the mere form of the certificate in section 225, which contains the statement that the person named therein "is entitled to vote in the municipal election on the — day of —, 1—." The expression of the right to vote at one time standing alone might imply an intention to exclude the right at another, but it has little weight when opposed to the more direct purposes and provisions of the statute, especially when it is found only in the form of the certificate.

The judgment of the Court is that the prayer of the petition be granted.

8562

McLESTER v. BARLOW.

1. EVIDENCE—APPEAL.—Where parol evidence has been admitted without objection to prove an original and substituted agreement for the sale of stock, an exception that it was error to admit parol evidence to vary the terms of a receipt which defendant contended was a memoranda under the statute of frauds is not considered.
2. CONTRACTS—IBID.—Where the main issue was whether there was a substitute agreement, a failure on part of the trial Judge to construe a receipt connected with the transaction is not prejudicial.

Before RAMAGE, C. J., special Judge, Dillon, Fall term, 1912. Affirmed.

Action by S. P. McLester against G. D. Barlow. Defendant appeals.

Messrs. Gibson & Muller and T. I. Rogers, for appellant.

Messrs. Gibson & Muller cite: Parol evidence is not admissible to vary the receipt: Jones on Ev., Sec. 445; 56 A. S. R. 664.

Messrs. J. K. Owens and T. D. Maness, contra, cite: A written contract may be modified or rescinded by parol: 124 U. S. 572; 63 U. S. 45; 96 U. S. 689; 101 U. S. 522; 79 S. C.; 46 S. C. 91; Fry Spec. Per., sec. 694; 2 Story Eq. Jur. 770.

May 28, 1913. The opinion of the Court was delivered by

MR. CHIEF JUSTICE GARY. The appellant's attorneys preface their argument with the following statement of the facts, which we adopt:

"The above entitled case was brought by the plaintiff, to recover of the defendant the sum of thirteen hundred and sixty-five dollars, with interest from the dates of payment on certain cotton mill stock, purchased by the plaintiff from the defendant. The complaint alleges payments of the amount in small items, running from February the 20th, 1909, to July the 10th. The stock purchased was forty shares of the Dillon Cotton Mills, at the price of forty-two hundred dollars, represented by the defendant according to complaint, to be worth one hundred and forty dollars a share. Plaintiff alleges that it was absolutely worthless, and the plaintiff received nothing for the money so paid. He alleges also that on the — day of August, 1910, the contract of purchase was rescinded, and defendant agreed to return the money paid. The defendant denied the contract of rescission, and alleged that the contract of sale was entered into in good faith, and was still binding, and that he was ready and willing to transfer the stock, upon the balance of the purchase money being paid. He also by way of affirmative relief, asked for specific performance

April Term, 1918.

“The exceptions raise practically two questions:

II. "Whether or not it was error for the Court to refuse to construe the said receipt or memorandum, and charge the jury that under the contract of sale the equitable title to the stock vested in McLester and became his property, the defendant holding it only as security for the balance of the purchase money."

Testimony in behalf of the plaintiff, for the purpose of
proving the original as well as the second or substi-
1 tuted agreement, was introduced without objection.

We will next consider the exceptions raising the second question.

The receipt therein mentioned was as follows:

Dillon, S. C., Feb. 20, '09.

Received of S. P. McLester ten hundred & 00-100 Dollars, part payment on forty (40) shares Dillon Cotton Mills; balance due me is thirty-two hundred (\$3,200) dollars. Said stock to be transferred to S. P. McLester soon as paid for. G. D. BARLOW."

His Honor, the presiding Judge, thus stated the issues to the jury, which were admitted by the respective attorneys to be correct:

"Now, gentlemen, I am going to endeavor in a few words, to state what the issues are, as I conceive them. As I understand, the plaintiff claims that there was a substitute agreement; in other words, that he was to get back his money under certain conditions set out in the complaint. That, as I understand it, is the main issue here today, that substitute agreement; or, in other words, the second agreement that is claimed took the place of the first.

"Now, the defendant comes into Court, and denies that substitute agreement, and sets up a counterclaim. He asks not only that the plaintiff be denied the relief that he asks for, but that he have judgment against the plaintiff for the balance of the purchase money. The Court (addressing counsel): "I believe, gentlemen, those are the issues? Mr. Owens: "Yes, sir." Mr. Gibson: "Yes, sir."

After his Honor, the presiding Judge, had charged the jury, the record shows that the following took place:

The Court (addressing counsel): "Is there anything further either side wishes charged?"

Mr. Muller: "I would like for the Court to construe that receipt, and to charge that if this contract was made for the purchase of this cotton mill stock, that the equitable title to that stock immediately passed to the plaintiff.

The Court: "I don't want to go into that, Mr. Muller."

After the verdict was rendered, the following agreement was stated in open Court: Mr. Rogers: "It is agreed that the verdict shall stand as it is, and that the interest be calculated by the clerk of Court, as demanded in the complaint."

As the main issue was, not as to the amount involved, but whether there was a substituted agreement, we fail to

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April Term, 1913.

see wherein the ruling of his Honor, the Circuit Judge, was prejudicial to the rights of the appellant.

Judgment affirmed.

8563

CANTY v. McCLARY-BROADWAY CO.

LIEN—ADVANCES—CHATTEL MORTGAGES.—A landlord has no lien by statute for advances on crops raised by a servant on land given him to cultivate as a part of his wages, nor has he any lien which he can assert against a chattel mortgage on the crops duly indexed of which mortgagee had no notice.

Before ERNEST GARY, J., Charleston, February, 1913.
Reversed.

Action by J. M. Cantey against McClary-Broadway Co. in court of magistrate A. J. Richbourg. Defendant appeals from Circuit order reversing magistrate judgment.

Messrs. Davis & Weinberg, for appellant, cite: *There was no tenancy*: 15 S. C. 85; 21 S. C. 53; 24 Cyc. 877-8, 880; 40 S. C. 575. *Landlord has no lien*: 21 S. C. 51; Code 1912, 4162; 26 Stat. 178. *As to remedy*: 15 S. C. 552; 5 S. C. 283; 1 Bail. 237.

Mr. J. J. Cantey, contra, cites: *Landlord and tenant existed*: 54 S. C. 62; 70 S. C. 392; 88 S. C. 375; 54 S. C. 292; 76 S. C. 85. *Plaintiff had a landlord's lien*: Code 1912, 4162; 68 S. C. 145. *Statutory remedy is not exclusive*: 24 S. C. 119; 58 S. C. 102. *Notice to mortgagee not necessary*: 60 S. C. 106; 82 S. C. 196; 53 S. C. 133; 69 S. C. 351; 70 S. C. 276; Code of Proc. 131; 26 A. & E. Ann. Cas. 1215; 72 S. C. 309; 91 S. C. 125.

May 29, 1913. The opinion of the Court was delivered by

MR. JUSTICE WOODS. The following is the agreed statement of facts:

"The plaintiff, J. M. Cantey, a landowner near Summerton, Clarendon county, State of South Carolina, at the beginning of the year 1912, employed one Harper Gibson as a farm hand, and as a part of his wages permitted him to plant about seven acres of land upon his plantation, situated in said county and State.

"That during the year 1912 the plaintiff made advances to the said Harper Gibson in the sum of ninety-seven and 71-100 dollars, and the said plaintiff has never at any time reduced to writing any lien he may have for the said advances.

"That during the month of October, 1912, the said Harper Gibson sold and delivered to the defendant, McClary-Broadway Co., two bales of cotton grown upon the land so planted by Harper Gibson during the year 1912.

"That the value of the said two bales of cotton was and is the sum of sixty-eight and 88-100 dollars; that the plaintiff claims that the defendant is unlawfully withholding said two bales of cotton, or the market value of same from said plaintiff, and has thereby damaged said plaintiff in the sum of sixty-eight and 88-100 dollars.

"That this is an action in claim and delivery for the possession of the said two bales of cotton or the value thereof, as provided under section 299 of the Code of Procedure of South Carolina.

"That the present claim of the plaintiff is for supplies the plaintiff made to the said Harper Gibson. The plaintiff, J. M. Cantey, has never been paid for the said advances by the said Harper Gibson.

"That before the commencement of this action the plaintiff made demand on the defendant, McClary-Broad-

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way Company, for the two bales of cotton in question, or the market value of the same, but the defendant had long before such demand sold the said cotton without any notice whatever of the plaintiff's alleged lien upon such crops for advances.

"That on the 17th day of February, 1912, the said Harper Gibson gave to the defendant a chattel mortgage covering all crops made on the said seven acres of land, which chattel mortgage was duly indexed in the clerk of Court's office for Clarendon county on February 27, 1912; that under the said mortgage the said Harper Gibson received advances from the defendant in the sum of sixty-eight and 20-100 dollars, which he owed the defendant at the time the cotton was received, the defendant paying the said Harper Gibson the difference between the value of the cotton and Harper Gibson's account in money."

The judgment of the magistrate in favor of the defendant was reversed in the Circuit Court, and the defendant appeals.

The use of the seven acres of land being a part of the wages paid Gibson for his labor, the plaintiff had no lien on it for rent. Even if a lien for advances had existed it could not be asserted against the defendant, McClary-Broadway Company, whose chattel mortgage was duly indexed and who paid in cash the surplus purchase money of the cotton, because it does not appear that the defendant had actual notice of any lien for advances, and section 4165 of the Civil Code of 1912 expressly provides that such a lien is good against subsequent purchasers and creditors only when indexed and recorded.

The judgment of this Court is that the judgment of the Circuit Court be reversed.

Reversed.

8564

BROWNING v. HOOVER.

LIMITATION OF ESTATES.—A DEED conveying land to B. “for and during the term of his natural life, and at his death to his heirs living at that time, in fee and not to be subject to the debts, contracts and liabilities of the said B.” vests in B. a fee simple.

Before WILSON J., Hampton, 1912. Affirmed.

Action by F. W. and Lazelle H. Browning against J. R. Hoover. Defendant appeals.

Mr. W. S. Tillinghast, for appellant, cites: 67 S. C. 130; 16 S. C. 220.

Mr. J. W. Vincent, contra, cites: 77 S. E. 706; 1 Rich. Eq. 404; 26 S. E. 716; 56 S. E. 546; 48 S. E. 223; 35 S. E. 507; 3 Rich. Eq. 271.

May 29, 1913. The opinion of the Court was delivered by

MR. JUSTICE WOODS. In this action to compel specific performance of a contract for the sale of land, the defendant relied on the allegation that the plaintiff had only a life estate and, therefore, could not make a good title. This contention rests on the fact that the conveyance from Belle M. Goethe, under which the plaintiff claimed was “to F. W. Browning for and during the term of his natural life and at his death to his heirs living at that time, in fee, and not to be subject to the debts, contracts and liabilities of the said F. W. Browning.”

There can be no doubt of the correctness of the Circuit Court, holding that F. W. Browning took a fee simple. *Davenport v. Eskew*, 69 S. C. 292; *Clinkscales v. Clinkscales*, 91 S. C. 59; *Egan v. Touchberry*, 93 S. C. 569.

Affirmed.

8565

HARBY & CO. v. BYERS LUMBER CO.

CLAIM AND DELIVERY—ISSUES.—Where a defendant in a claim and delivery suit did not in the first instance obtain the possession of the property in question wrongfully, it is necessary to allege and prove demand before suit, and whether demand was made is usually for the jury.

Before SPAIN, J., Hampton, February, 1913. Affirmed.

Action by Hardy & Co. against Byers Lumber Co.
Plaintiff appeals.

Mr. J. W. Vincent, for appellant, cites: *Demand not necessary in many instances*: 25 Am. Dec. 258; 91 Am. Dec. 428; 81 Am. Dec. 795; 23 Ark. 417; 21 Miss. 269; 21 Mo. App. 443; 24 Ia. 322; 62 N. W. 413; 12 Pac. 434; 17 N. W. 268; 20 So. 536. *Verdict is in conflict with the charge*: 68 S. C. 523.

Messrs. Warren & Warren, contra.

May 29, 1913. The opinion of the Court was delivered by

MR. CHIEF JUSTICE GARY. The record contains the following statement of facts:

"This is an action in claim and delivery brought by the plaintiff by the service of a summons, complaint, affidavit and bond, in the usual form, to recover possession of certain chattels from the defendants. The plaintiff claims the property under a chattel mortgage given by the Osceola Lumber Company to plaintiff, to secure the purchase money of the property, which chattel mortgage was duly recorded in the office of clerk of Court for Barnwell county, within the time allowed by law. The case came on for trial before Judge T. H. Spain and a jury, which trial resulted

in a verdict for the defendants. Before adjournment of Court, counsel for plaintiff made a motion for a new trial, on the grounds that his Honor had erred in submitting to the jury, an issue as to whether a demand had been made or not, the plaintiff's counsel taking the position, that no demand was necessary in this case; and also on the ground, that the jury had disregarded the charge given them by the Court. This motion was refused and judgment was duly entered on the verdict. From this judgment notice of intention to appeal to this Court was duly served and filed."

We will first consider the exceptions raising the question, whether his Honor, the presiding Judge, erred in submitting to the jury, the issue as to a demand—appellant's counsel taking the position that no demand was necessary.

The complaint alleges "that the defendants are in possession of the said personal property, and wrongfully detain the same from the plaintiff, although demand has been duly made upon the defendants, for the return of the said property."

The defendant set up as a defense "that a part of the property described in the complaint, or some property answering the description therein contained, is in possession of these defendants, having been purchased in the open market for value, from the person having control of the same, without notice of the plaintiff's claim thereto, or any part thereof."

It was admitted upon the trial of the case, that if John Hart, former secretary of the Osceola Lumber Company, and a witness for the defendant, had been present he would have testified that the plaintiff, H. J. Harby & Company, authorized him to sell the property in question for four hundred dollars.

It will be observed, that the complaint does not allege that the defendant took wrongful possession of the property, but that the defendant wrongfully detained it,

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although demand was made by the plaintiff for the return thereof. It will also be observed, that the testimony of John Hart tends to show that the possession of the property by the defendant, in the first instance, was not wrongful.

Under these circumstances, his Honor, the presiding Judge, properly submitted to the jury the issue as to a demand for the return of the property.

Ladson v. Moslowitz, 45 S. C. 388; concurring opinion in *Holliday v. Poston*, 60 S. C. 103, cited with approval in *Bingham v. Harby & Co.*, 91 S. C. 121.

These views also show that the exceptions raising the question, whether the jury disregarded the charge of his Honor, the presiding Judge, can not be sustained.

Judgment affirmed.

8566

BRAND SHOE CO. v. WOMEN'S WEAR SHOP.

PLEADINGS.—AN ANSWER alleging "the defendant * * * for a first defense alleges that it denies every allegation in the said complaint contained and therein stated," is not frivolous.

Before SPAIN, J., Barnwell, March, 1913. Affirmed.

Action by Brand Shoe Company against Women's Wear Shop. Plaintiff appeals.

Mr. Thos. M. Boulware, for appellant, cites: 14 Barb. 553; 18 How. Pr. 240; 2 Abb. Forms 17.

Mr. James M. Patterson, contra.

May 28, 1913. The opinion of the Court was delivered by

MR. CHIEF JUSTICE GARY. This is an action on account for goods, which the complaint alleges were sold by the plaintiff to the defendant, and the appeal is from an order refusing to strike out the answer as frivolous.

The answer is as follows:

"The defendant, Women's Wear Shop, answering the complaint herein, and for a first defense thereto, alleges that it denies every allegation in said complaint contained and therein stated."

His Honor, the Circuit Judge, refused the motion to strike out the answer as frivolous, on the ground that it is a general denial.

In the first place, an order refusing to strike out an answer on the ground of frivolousness is not appealable. *Bank v. Witcover*, 77 S. C. 441; *Harbert v. Atlanta etc. Ry.*, 74 S. C. 13.

But waiving such objection the appeal can not be sustained. The defendant concedes that the answer would have been sufficient if the defendant had denied the allegations of the complaint, without alleging that it did so.

We do not deem it necessary to cite authorities to show that the difference in form is wholly immaterial.

Appeal dismissed.

8567

SANDERS v. ÆTNA LIFE INSURANCE CO.

1. **BANKRUPTCY—INSURANCE.**—An insurance policy on the life of a bankrupt, which has no cash surrender value and for which the insurer would have paid no money, at the time of adjudication of bankruptcy or prior to death of insured, which occurred while settlement of the bankrupt estate was pending and before discharge, does not pass to the trustee by operation of law.
2. **IBID.—IBID.**—Where in such policy the power is given the insured to change the beneficiary without his consent, such power does not pass to the trustee.

MR. JUSTICE WOODS *dissents*.

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3. *IBID.*—*IBID.*—Nor do the proceeds of such policy belong to the trustee because the wife was adjudged a bankrupt as a partner with the insured, where she was discharged before the death of the husband bankrupt.

Before MEMMINGER, J., Greenwood, ———, 1912.
Affirmed.

Two cases, Marshall F. Sanders *et al.* against Ætna Life Insurance Co., and S. H. McGhee and Mrs. Anna Belle French *et al.* against same. Defendants appeal.

Messrs. Giles & Ouzts and C. C. Featherstone, for appellants.

Mr. Featherstone cites: *The trustee by operation of law is vested with the powers the bankrupt could have exercised for his own benefit*: 86 S. C. 1; 69 C. C. A. 496; 51 C. C. A. 97; 1 Loveland 818, 821; 205 U. S. 51; 182 Fed. R. 716; 51 C. C. A. 151; sec. 70a of Bankrupt Act; 106 Fed. R. 154; 157 Fed. R. 544; 169 Fed. 1019; 175 Fed. 65; 186 Fed. 537; 182 Fed. 716, 949; 191 Fed. 325; 185 Fed. 98; 175 Fed. 65; 178 Fed. 632; 188 Fed. 702; 165 Fed. 984. *Sec. 1824 of Code of 1902 should not be applied to prevent the trustee from acquiring the property*: 62 Am. St. R. 878; 77 S. C. 299; 87 S. C. 399.

Messrs. Grier, Park & Nicholson, contra, cite: *Policy without a cash surrender value does not pass to the trustee*: 49 Law Ed. 1018; 51 Law Ed. 771; 44 C. C. A. 223, 287; 78 Am. St. R. 129; 104 C. C. A. 227; 113 C. C. A. 158. *Policies specially exempt by the act*: 140 Fed. 138; 113 C. C. A. 158. *First beneficiary could only be deprived of vested right by change of beneficiary*: 77 S. C. 300; 2 May on Ins., sec. 399; 128 U. S. 195; 49 L. R. A. 737; 87 S. C. 395; 86 S. C. 1.

May 30, 1913. The opinion of the Court was delivered by

MR. CHIEF JUSTICE GARY. This is an action on two policies of insurance, by the beneficiaries therein named.

His Honor, the Circuit Judge, rendered judgment in their favor, and the defendant appealed.

It appears from the agreed statement of facts, upon which the case was heard in the Circuit Court, that M. F. Sanders and Bessie W. Sanders, his wife, were copartners in trade, as M. F. Sanders & Company, and both as partners and as individuals, were adjudged bankrupts on the 30th of June, 1911, in pursuance of a petition filed on the 26th of June, 1911. That M. F. Sanders informed the trustee that he had certain policies of insurance on his life, which were in the Bank of Greenwood, where they could be seen by him. That the trustee said he would take the matter up, some other time. That the said policies were never scheduled by the bankrupts. That M. F. Sanders carried the policies to his attorney, who advised him that they had no cash surrender value, and that he should communicate this fact to the referee and trustee, which he did. On the 1st of November, 1911, Bessie W. Sanders was discharged as a bankrupt, but M. F. Sanders was never discharged. On the 12th of January, 1912, M. F. Sanders committed suicide, and left surviving him his wife and three children, who are plaintiffs in this action. On the 22d of November, 1911, upon the application of M. F. Sanders, the beneficiaries in the two policies were changed in favor of his three children. The policies provided that the insured should have the right to change the beneficiary without his or her consent. In the application for the change of beneficiary, M. F. Sanders made this statement: "I am not now adjudged insolvent, nor have I made a general assignment, for the benefit of creditors, that remain unsatisfied." The two policies were originally payable to Bessie W. Sanders, if she survived the insured, otherwise, to his executors, administrators or assigns. "Neither of the policies had any cash surrender value, prior to the death

of the insured, and no loan value, until the end of the third premium year, to wit: 29th of July, 1912, nor until the payment of the third premium of 29th of July, 1912; and the company would have paid no money, prior to or at the date of the adjudication in bankruptcy, or prior to Sanders' death. The cash surrender value of neither of said policies has been ascertained, and stated to the trustee, by the company issuing the same, and the trustee made no effort to ascertain the same from the company, or to communicate the same to M. F. Sanders or Bessie W. Sanders." The bankrupt estate has never been settled.

The question to be determined, is, whether the policies were vested in the trustee by operation of law, when, it is admitted, that at the time M. F. Sanders & Bessie W. Sanders were adjudged to be bankrupts, the said

1 policies had no cash surrender value, and the company would have paid no money therefor, prior to the date of the adjudication in bankruptcy, or prior to Sanders' death.

Section 70a of the bankrupt act is as follows:

"The trustee of the estate of a bankrupt, upon his appointment and qualification * * * shall be vested by operation of law, with the title of the bankrupt, as of the day he was adjudged a bankrupt, except in so far as it is to property, which is exempt to all (1) documents relating to his property, * * * (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person, (4) property transferred by him in fraud of his creditors, (5) property which prior to the filing of the petition, he could, by any means, have transferred, or which might have been levied upon and sold, under judicial process levied against him: *Provided*, That when any bankrupt shall have any insurance policy, which has a cash surrender value, payable to himself, his estate or personal representative, he may within thirty days, after the cash surrender value has been ascer-

tained and stated to the trustee, by the company issuing the same, pay or secure to the trustee, the sum so ascertained and stated, and continue to hold, own and carry such policy, free from the claims of the creditors, participating in the distribution of his estate under the bankruptcy proceedings, otherwise, the policy shall pass to the trustee, as assets."

The *proviso* in section 70a when analyzed, shows, 1st, that the said section had in contemplation policies that had some cash surrender value, at the time the insured was adjudged a bankrupt; 2d, that when such value has been ascertained and stated to the trustee, by the company issuing the policy, the bankrupt may pay or secure to the trustee the sum so ascertained; 3d, that the payment must be made or security given to the trustee, within thirty days after said value has been ascertained; 4th, that upon complying with these requirements, the bankrupt shall continue to hold and own such policy, free from the claims of creditors; and 5th, that if the bankrupt complies with said requirements, the policy shall not pass to the trustee, as assets.

In order to place a proper construction on said section, we naturally endeavor to ascertain the object, which it was the intention of Congress to accomplish.

It will be observed that policies of insurance are placed upon a different footing, from all other property vested in the trustee; and that it was not intended that the policies, but only their cash surrender value should become assets, unless the insured failed or refused to comply with certain prescribed conditions.

It is true, the *proviso* contemplates a benefit to the bankrupt estate, and, when the policies have a cash surrender value, they are vested in the trustee by operation of law, in order that said value may be added to the assets. But the main object was to enable the bankrupt, to hold and own the policy free from the claims of his existing creditors; and the only effect of holding that the title to the policies was vested in the trustee, even when they were without

cash surrender value, would be to defeat the principal aim of the statute, without increasing the assets. The law never intends that an act should be done, when its effect would be wholly nugatory.

If it had been ascertained that the policies had a cash surrender value of one hundred dollars, and the insured had paid that sum, the trustee would no longer have any interest in them. Do the admitted facts show that the bankrupt forfeited his right to pay the cash surrender value, and to continue to hold the policies? Let us consider the bankrupt's rights, in view of the fact that the cash surrender of the policies has not been ascertained and stated to the trustee, by the company issuing the same. It is admitted that the trustee made no effort to ascertain the same from the company, or to communicate the same to M. F. Sanders or Bessie W. Sanders; that M. F. Sanders notified both the referee and the trustee of the existence of the policies, and that he and his attorney regarded them as having no cash surrender value; that the trustee said he would take them up at some other time; that the bankrupt died on the 12th of January, 1912, and that the bankrupt estate has not been settled. The only inference to be drawn from these facts is, that if the bankrupt were alive he would still have the right to pay the cash surrender value of the policies, and hold them free from his existing creditors, upon complying with the requirements of said section; but, that, as he is dead, this privilege could be exercised by the representative of his estate. *In re Judson*, 113 C. C. A. 158.

Under our interpretation of the said section, this, however, is an immaterial question, as the fact that the policies had no cash surrender value, shows that the title to them did not become vested in the trustee—there being no failure to perform a condition where the nonperformance thereof, would have caused the title to the policies to become assets of the bankrupt estate.

In the case of *Hiscock v. Mertens*, 205 U. S. 202, the Court had under consideration the question, whether the cash surrender value of a policy of insurance under section 70a of the bankruptcy act, must be provided for, in the policy, or whether it is sufficient if the policy have such value, by the concession or practice of the company. In discussing this question, the Court thus states the object of the foregoing provision: "It was an actual benefit, for which the statute provided, and not the manner in which it should be evidenced. * * * What possible difference could it make, whether the surrender value was stipulated in a policy, or universally recognized by the companies. In either case, the purpose of the act would be subserved, which was to secure to the trustee the sum of such value, and to enable the bankrupt to continue to hold, own and carry, such policy free from the claims of the creditors, participating in the distribution of the estate, under the bankruptcy proceedings."

The statute is thus explained in the case of *Morris v. Dodd*, 110 Ga. 606, 78 Am. St. Rep. 129, 50 L. R. A. 33:

"The purpose of the bankruptcy act, is to take the property owned by the bankrupt when the petition is filed, and apply it toward the payment of his then existing debts, discharging him in due course from any further liability, his after acquired property not being subject to such debts. This being true, it is apparent that the creditors represented by the trustee, whose debts cannot continue against the bankrupt, can have no insurable interest in his life for the purpose of indemnifying themselves against loss. In view, therefore, of the authorities cited and the language of the act itself, it seems that a policy of insurance on the life of a bankrupt, though payable to his legal representatives, does not vest in the trustee as assets of the bankrupt's estate, if the policy has no cash surrender value."

To the same effect is the case of *In re Judson*, 113 C. C. A. 158, in which the Court says: "We think that the statute

in question clearly indicates an intention upon the part of Congress to permit bankrupts to retain the advantages of existing life insurance policies, provided they will pay to their trustees all that could be obtained by surrendering such policies at the commencement of the proceedings. In the case of policies having a cash surrender value the proviso covers the case. In the case of policies having no cash surrender value the proviso does not apply expressly, but reading it in connection with the other provisions, we think that such policies are not 'property,' within the meaning of the statute, but are in the nature of personal rights. True they are 'property' within technical definitions of the term. But they represent nothing more than the right to pay future premiums at a fixed rate. Their value is altogether speculative, and in our opinion, it was not the intention of Congress that bankrupts should be deprived of their policies, to enable trustees of bankrupt estates to use their funds to speculate with."

The first and second propositions upon which the appellant's rely are: 1. "That the bankrupt (the insured) had a 'power which he might have exercised for his own benefit,' viz.: the power to change the beneficiary, and that
2 that power passed to the trustee. 2. That the power to change the beneficiary was property, within the meaning of the act, which he could have transferred or assigned, and that that right passed to the trustee."

These propositions are unsound, for the reason they presuppose, that the policies were vested in the trustee, which we have shown is not the fact.

The third proposition is as follows: "That Mrs. Sanders, the beneficiary, being also a bankrupt, and the
3 insured having died before the estate was wound up, the fund belongs to the trustee."

In the first place, the value of Bessie W. Sanders' interest in the policies, as an asset in the hands of the trustee, must be determined, with reference to the filing of the petition.

and not, as contended, at the time her husband died. And in the second place, whatever interest she may have had, at that time, was subject to be defeated by the action of the insured in changing the beneficiary, which was actually done. The appellant, however, contends, that the statements upon which the change was made, were false. If there was fraud in this respect, it did not affect the rights of the trustee, and he has no cause to complain. *Morris v. Dodd*, 110 Ga. 606, 78 Am. St. Rep. 129, 50 L. R. A. 33.

Judgment affirmed.

MR. JUSTICE HYDRICK *concur*s.

MR. JUSTICE WATTS *disqualified*.

MR. JUSTICE FRASER, *concurring*. I concur with the Chief Justice for the reason that the statute provides that the trustee in bankruptcy shall take "(3) powers which he (the bankrupt) might have exercised for his own benefit but *not those which he might have exercised for some other person.*" It is beyond question that the bankrupt might have exercised this right for some other person. He did. The rule of statutory construction is that where there is a conflict between two provisions of a statute, the last shall govern as the last expression of the legislative will. So it seems to me that where circumstances throw a case under the last clause, then the last clause must govern. Inasmuch as the statute distinctly says that the power which he might have exercised for some other person shall *not* go to the trustee, the Courts have no right to award these policies to the trustee. If we do, we violate the terms of the act. If Congress had intended to confine the exemption to those powers that the bankrupt might have exercised exclusively for others, it was easy to have said so. The proviso to item (6) treats of policies payable to the bankrupt or to his estate and made no other provision as

though it had exhausted the subject. It is difficult to see how a policy that has no cash surrender value and not payable to the bankrupt or his estate, passes to the trustee. The intention is to save the insurance, not to destroy it. Item (5) does not control item (3), however, as item (3) is a special provision and item (5) is a general provision.

State ex rel. Lyon v. Bowden, 92 S. C., pg. 401: "But even if the two provisions were inconsistent no principle of construction is better settled, both by authority and reason, than this: Where, in a legislative enactment, a special provision is made as to a subject which would otherwise be embraced in a general provision on the same subject the special provision is held to be an exception, and not intended to be embraced in the general provision."

Whatever we may now think of the propriety of allowing a debtor to take money that ought to go to his creditors and with it buy life insurance for the benefit of his family, and allow the family to collect and enjoy the proceeds of the policy to the entire exclusion of the creditors, even from that portion represented by the premiums paid, still the law is too well settled to doubt its existence or escape its consequences except by statutory enactment. Here the enactment is the other way.

Again the trustee must take the required steps to change the beneficiary before he can claim the proceeds of the policy.

In *Deal v. Deal*, 87 S. C., pg. 395, it was held that a strict compliance with the terms of the policy are necessary before a change in the beneficiary can be enforced. Here there was no effort to change the beneficiary during the life of the insured, and now that the rights of the beneficiaries have become absolute by the death of the insured, the trustee asks that without a change of beneficiary, even now, the proceeds be paid to him, and I do not think it can be done. Under the law of South Carolina these policies are payable to the beneficiaries named in the policies, and

I do not see that the Federal statute is in conflict. If these policies had cash surrender value, say one hundred and fifty dollars, the trustee would have been entitled to the one hundred and fifty dollars, but as they had no value, the trustee claims to be entitled to fifteen thousand dollars. I can not think the claim can be allowed, and concur with the Chief Justice.

MR. JUSTICE WOODS, *dissenting*. I dissent. The right of the insured to change the beneficiary of the policies, being a power which he could exercise for his own benefit, was property both under the general principles of law and under the express terms of the bankrupt act, and it passed to the trustee in bankruptcy, under the statute expressly providing that all property not exempt, including such a power, should pass to the trustee. *Earle v. Maxwell*, 86 S. C. 1; *In re Hettling*, 175 Fed. 65; *In re Dolan*, 182 Fed. 949; *Clark v. Equitable Life Ins. Society*, 143 Fed. 175; *In re Whepley*, 169 Fed. 1019; *In re Wright*, 157 Fed. 544; *In re Slingluff*, 106 Fed. 154; *In re White*, 174 Fed. 333, 26 L. R. A. (N. S.) 451; *In re Orear*, 178 Fed. 632, 30 L. R. A. (N. S.) 990; *In re Andrews*, 191 Fed. 325, 41 L. R. A. (N. S.) 123.

It is argued that it did not pass in this instance, however, for the reason that the policy was payable to the wife of the insured and so stood at the date of the petition and adjudication in bankruptcy, and such a policy is expressly exempted from the claims of creditors of the insured by section 2721 of Civil Code of the State. This argument would be sound if the Constitution of this State did not expressly forbid that the constitutional exemption to the husband and wife jointly should not exceed \$1,000.00 real estate and \$500.00 personal property, which exemption was claimed and allowed. But for this provision of the Constitution, it would have been within the legislative power to extend the constitutional exemption to include life

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insurance policies. *Holden v. Stratton*, 198 U. S. 202, 49 L. Ed. 1018.

The bankrupt statute did not permit Sanders to retain the policies by tendering to the trustee the cash surrender value, because it is admitted in the agreed statement of facts that they had no cash surrender value, and that the insurance company would not have paid any money for them at the date of the adjudication in bankruptcy or at any time prior to the death of Sanders. This admission excludes the case from the provision of the bankrupt act allowing the bankrupt to retain an insurance policy on payment of the cash surrender value, and takes it out of the rule laid down in *Hiscock v. Martens*, 205 U. S. 202, 51 L. Ed. 771, that policies having a cash surrender value within the meaning of the act embrace those which either by their terms or by the practice or concession of the company issuing them have such value.

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GRANITE BRICK CO. v. TITUS.

SERVICE OF SUMMONS.—A NONRESIDENT attending the Federal Court sitting in this State as a party and witness in a case there being tried is exempt from service of summons and complaint in the Federal courtroom. State statutes and laws do not apply to such case. *Brown v. Miller Lumber Co.*, 83 S. C. 221, distinguished from this case.

Before ERNEST GARY, J., Richland, November, 1912.
Affirmed.

Motion to set aside service in Granite Brick Co. against Edward H. Titus. Plaintiff appeals.

Messrs. Lyles & Lyles, for appellant, cite: *Party may be served in civil action while attending Court*: Harp. 452; 4 McC. 152; 56 S. C. 56. *Service is within the exception for maliciously bringing the action being tried*: 25 L. R. A. 721.

Messrs. B. L. Abney and Shand & Shand, contra.

Messrs. Shand & Shand cite: *The statutes and laws of this State as to service of nonresident do not apply in this case*: 83 S. C. 224; 65 Am. St. R. 731 ;1 Wall. Jr. 169; 18 Fed. Cas. 1137; 19 Blatch 517; 170 Fed. 618; 173 Fed. 550; 87 N. Y. 570; 2 Stro. 1064; 8 T. R. 534; 2 Ves. & B. 373; 9 Ann. Cas. 833; 11 Ann. Cas. 1144.

June 6, 1913. The opinion of the Court was delivered by

MR. JUSTICE FRASER. This is an appeal from an order of Judge Ernest Gary, setting aside the service of a summons on the defendant. The defendant was and is a non-resident of this State, and came into this State for the sole purpose of attending a trial in the United States Court, as a party and witness. The summons was served in the Federal Court, while his case was on trial and a witness was on the stand.

The appellant frankly admitted, unless this Court would overrule the case of *Breon v. Miller Lumber Company*, 83 S. C. 221, he has no case. This Court would not overrule that case, even if it were germane to this issue, but it is not. Whatever may be the right of the legislative department to hinder the due administration of justice in the Courts of this State by the service of a summons merely, and thereby distract the attention of parties and witnesses from the cause then being tried, we can not so construe the act as to hold that it applied to a Court over which the legislature of this State has no jurisdiction. This doctrine is not new. When the Stamp Act was passed by the Fed-

eral government and it was provided that an unstamped contract should not be received as evidence in "any Court," it was held that "any Court" meant any Federal Court. The reason was that inasmuch as the Federal government had no right to prescribe rules of evidence for the State Courts, "any Court" meant any Federal Court. The converse is equally true and when the State statute says "any Court," it must be taken to mean "any State Court." The appellant relies upon the State statute for the right to make this service of process upon the defendant. At common law it was not allowed and inasmuch as we have held that it does not apply, the other exceptions do not arise.

The judgment of the Circuit Court is affirmed.

8570

WILLIAMS v. HATCHER.

1. SERVICE OF SUMMONS—ATTORNEY.—WAIVER may be sometimes presumed from conduct; but where a nonresident by his attorneys requests service of complaint on them reserving all rights, and they serve notice of motion to strike from the complaint, which motion was abandoned, it is held the nonresident did not thereby waive the right to move to set aside the service on him in this State while attending Court to testify and assist in conducting a case in this Court as attorney for a nonresident client.
2. A NOTICE OF MOTION TO SET ASIDE A SERVICE OF A SUMMONS stating that the movant lives in a certain city in a foreign State is sufficient suggestion to plaintiff of where defendant may be served.
3. SERVICE ON NONRESIDENT—WAIVER.—A nonresident does not submit himself to the jurisdiction of the Court by employing resident counsel to move to dismiss service because the Court has thereby acquired no jurisdiction of his person.
4. IBID.—ATTORNEYS.—A foreign attorney coming into this State to attend to the trial of a case here is exempt from service of process while in this State on that business.

Before FRANK B. GARY, J., Spartanburg, December, 1912. Affirmed.

Motion in case of Robert M. Williams against M. Felton Hatcher to dismiss service of summons. Plaintiff appeals on the following exceptions:

"1. The Court erred in ruling and holding that the defendant was exempt from service of civil process for the reason that he had voluntarily come into the jurisdiction of the Court for the purpose of testifying in a pending cause, the error being (a) that such exemption does not apply to a nonresident witness in the absence of actual arrest of the body or goods of the witness; (b) that in order to entitle the defendant to the exemption it was a prerequisite that he should show that his attendance was *necessary*; (c) that the affidavit of defendant upon which the motion to dismiss was based conclusively showed that the attendance of the defendant as a witness in the cause therein alleged to be pending was neither necessary nor possible, in this, that defendant deposed in his said affidavit that one W. J. Massee was held in the State of South Carolina under a warrant of extradition, that a writ of *habeas corpus* had been issued to inquire into the legality of the detention of the said Massee, and that he, the said defendant, was the only one acquainted with the facts out of which the criminal prosecution of the said Massee arose, and hence it was necessary for him to attend the hearing of the said writ in order to testify to the merits of said criminal prosecution; whereas it is with all respect submitted that such evidence is inadmissible in a proceeding, the only possible object of which is to inquire into the regularity of the papers of extradition, and not into the merits of the case.

"2. His Honor erred in ruling and holding that a non-resident attorney who comes into the jurisdiction for the purpose of appearing as counsel in a pending cause is

exempt from service of a civil process, the error being that no such exemption applies to nonresident attorneys.

"3. His Honor erred in ruling and holding that defendant had appeared for the sole purpose of objecting to the jurisdiction of the Court, the error being that the proceedings had upon the part of the defendant prior to the service of the notice of the motion to abate on October 22d, 1912, viz.: the notice of defendant's attorneys of appearance for the purpose of demanding a copy of the complaint; the letter of defendant's attorneys, Messrs. Sanders & DePass, of September 3d, 1912, to Messrs. Nicholls & Nicholls, plaintiff's attorneys, praying an extension of time to answer; the notice of September 14th, 1912, that defendant would move before his Honor, Frank B. Gary, Circuit Judge, at Union, S. C., to strike certain allegations from the complaint, and failing in that to ask an extension of time to answer; and the agreement of September 17th, 1912, entered into between attorneys for plaintiff and defendant, whereby an extension of time to answer was granted by plaintiff's attorneys—showed that the appearance of the defendant was general, and the special appearance sought to be entered by the defendant's attorneys through the notice of October 22d, 1912, was of no avail to vitiate the effect of said general appearance, it having come too late.

"4. His Honor erred in ruling and holding that the defendant had not waived his right to object to the jurisdiction of the Court, the error being that the motion was heard 'upon all the papers in the case,' among which said papers were the following, to wit: the notice of defendant's attorneys of appearance for the purpose of demanding a copy of the complaint; the letter of defendant's attorneys, Messrs. Sanders & DePass, of September 3d, 1912, addressed to Messrs. Nicholls & Nicholls, plaintiff's attorneys, praying an extension of time to answer; the notice of September 14th, 1912, that defendant would move before

his Honor, Frank B. Gary, Circuit Judge, to strike certain allegations from the complaint, and failing in that to ask an extension of time to answer; and the agreement of September 17th, 1912, entered into between the attorneys for plaintiff and defendant, whereby an extension of time to answer was granted by the plaintiff's attorneys; all of which said proceedings were had upon the part of the defendant before any special appearance for the purpose of objecting to the jurisdiction of the Court was sought to be entered in his behalf. It is, therefore, respectfully submitted that the plea to the jurisdiction came too late to avail defendant, and the proceedings above recited constituted a voluntary submission to the jurisdiction of the Court, and were a waiver of the alleged jurisdictional defect.

"5. His Honor erred in setting aside the service of the summons, the error being (a) that the notice of the motion to abate was insufficient on its face, in this, that it did not suggest or point out by what manner plaintiff could get service upon the defendant; (b) that the defendant did not personally sign the notice of the motion, and the subscription by defendant's attorneys of itself constituted a voluntary submission to the jurisdiction of the Court."

Messrs. Harry S. Stokes and Nicholls & Nicholls and T. T. McCarley, for appellant, cite: Reservation must state right reserved: 87 S. C. 322. Acceptance of service and requesting extension of time to answer constitute voluntary appearance: 28 S. C. 122; 83 S. C. 574; 67 S. C. 229; 46 S. C. 11; 69 S. C. 278; 86 S. C. 324. Motion to strike out is a plea to the merits: 49 N. E. 80. Motion to set aside service signed by local attorney is admission of jurisdiction: 6 Mod. 146; Lawes' Pl. 91; 6 Pick. 371; 67 Vt. 380. Defendant is not exempt from process: Harp. 191; 5 Rich. L. 194; 56 S. C. 56; 1 Brev. 130; 19 L. R. A. 560; 55 Fed. 593.

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Messrs. John Gary Evans and Sanders & DePass, contra, cite: Defendant is exempt from service of summons in civil action: 83 S. C. 221; 67 Am. St. R. 665; 74 Fed. 442; 32 Am. St. R. 770. Defendant did not waive his right to move to set aside the service: 33 S. C. 609; 48 S. C. 73.

June 6, 1913. The opinion of the Court was delivered by

MR. JUSTICE FRASER. This is an appeal from an order of Judge Frank B. Gary setting aside the service of a summons. The defendant is an attorney residing in Macon, Georgia. His client, W. J. Massee, was arrested in Spartanburg, South Carolina, and applied to Judge Sease for a discharge under a writ of *habeas corpus*. Massee was held by the South Carolina authorities pending extradition proceedings under a requisition from the Governor of Tennessee. The respondent had represented Massee in his troubles in Tennessee and his affidavit claimed that his sole business in this State was to appear as attorney and witness for Massee in the proceedings before Judge Sease, and as such, he was exempt from service of process in coming, remaining and returning. After the service of the summons, the following notice was served upon plaintiff's attorneys:

"Please take notice that we appear for the defendant in the above stated case solely for the purpose of demanding that you serve upon us a copy of the complaint in said case at our offices, either in the Cleveland building or on the public square in the city of Spartanburg. In serving this notice we waive no rights, but expressly reserve the same.

JNO. GARY EVANS,
SANDERS & DEPASS,
Attorneys for Defendant."

In conformity with the above notice, plaintiff, on August 24, 1912, by his attorneys, served upon Messrs. Sanders

& DePass and John Gary Evans, attorneys for defendant, his complaint.

The following acceptance of service of the complaint was endorsed upon the original complaint:

"Due and legal service of a copy of the within complaint accepted at Spartanburg, S. C., Aug. 24, 1912—without waiving our rights as to appearance or otherwise, as set forth in demand for copy complaint.

SANDERS & DEPASS,
JOHN GARY EVANS,
Defendant's Attorneys."

The plaintiff served an amended complaint. Service accepted as follows:

"Service of copy of amended complaint accepted subject to conditions endorsed on original complaint.

JOHN GARY EVANS,
SANDERS & DEPASS,
Defendant's Attorneys."

Thereafter, defendant's attorneys asked of plaintiff's attorneys an extension of time to answer and then served the following notice of a motion to strike out certain allegations of the complaint:

"Please take notice that, reserving to ourselves all rights, on Tuesday, September 17th, 1912, at nine-thirty o'clock a. m., or as soon thereafter as counsel can be heard, we will, upon your amended complaint in the above stated case, move before his Honor, Frank B. Gary, Circuit Judge, at Union, S. C., to strike from your complaint the following:"

There was an agreement as to the time for the hearing of the motion and time allowed to answer after the hearing. The motion was withdrawn and the following served:

"Messrs. Nicholls & Nicholls, Attorneys for Plaintiff:

"Please take notice, we will, on the first day of the next term of Court of Common Pleas for Spartanburg County,

at 10 o'clock a. m., or as soon thereafter as counsel can be heard, move the Court upon the annexed affidavit, a copy of which is herewith served upon you, and upon all of the papers in the case, to set aside the services of the summons on the ground that the defendant, not being a resident of the county of Spartanburg, or the State of South Carolina, and being in the State solely for the purpose of attending Court as attorney and witness, he was exempt from suit, and under the facts stated in the affidavit he is not amenable to suit or process in this State.

JOHN GARY EVANS,
SANDERS & DEPASS,
Attorneys for Defendant."

Thereafter the case shows the following :

"The matter came on to be heard before the Hon. Frank B. Gary, presiding Judge, at the November, 1912, term of the Court of Common Pleas of Spartanburg county, upon all the pleadings and papers hereinbefore set forth, and on December 5, 1912, his Honor passed the following order, which was filed in the office of N. Leonard Bennett, clerk, on December 7, 1912.

"The summons and complaint herein were served upon the defendant in Spartanburg county. The defendant is a nonresident of South Carolina. It appears that when he was served with the summons he was in this State for the purpose of testifying as a witness in a certain case then pending here and for the purpose of acting as chief counsel in the said litigation and for no other purpose. The defendant now appears for the sole purpose of objecting to the jurisdiction of the Court. He contends that a non-resident is exempt from process while here for the purpose of testifying and of acting as principal counsel in a pending case, and here for no other purpose.

"It seems to me that the case of *Breon v. Lumber Co.*, 83 S. C. 225, and the cases therein cited are conclusive of

the question, and show that the contention of the defendant should be sustained.

"It is claimed, however, that the defendant has voluntarily submitted himself to the jurisdiction of the Court by his conduct subsequent to the attempted service. I cannot take this view of the matter, for it seems to me that the defendant has throughout attempted to reserve his right and to avoid submitting himself voluntarily to the jurisdiction.

"It is, therefore, ordered, that the attempted service of the summons herein upon the defendant be, and the same is hereby, set aside and declared to be of no effect."

From this order there was an appeal.

Let the exceptions be reported.

The questions raised are: Did the defendant waive jurisdiction?

Waiver is generally a question of intention. It is true intention will be conclusively presumed from conduct, at times. The authorities are not at one as to the conduct from which a conclusive presumption will be drawn.

1 The reservation of rights was continually made and the intention not to waive any rights as a matter of fact is clear throughout. The question is, has the defendant done anything that as a matter of law is a waiver? The authorities, too numerous to cite, and too loose in expression to attempt to reconcile, are generally agreed that a general appearance, an answer and a motion in the cause are, as a matter of law, waivers. Here the appearance was special, to demand a copy of the complaint. The answer was not served and while a notice of motion was given, it was not made. The Circuit decree found that there was no intention to waive as a matter of fact, and there was no waiver in law.

Fitzgerald v. J. I. Case Threshing Machine Co., 94 S. C. 54, 77 S. E. Rep. 739, differs from this case. In that case a motion was made. Here there was only notice of inten-

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tion to make a motion. The exceptions that raise this question are overruled.

The second question as stated in appellant's argument, is as follows: "5. His Honor erred in setting aside the service of the summons, the error being (a) that the notice of the motion to abate was insufficient on its face, in this, 2 that it did not suggest or point out by what manner plaintiff could get service upon the defendant; (b) that the defendant did not personally sign the notice of the motion, and the subscription by defendant's attorneys of itself constituted a voluntary submission to the jurisdiction of the Court."

These propositions must be overruled.

(a) The complaint states that the defendant resides in Macon, Georgia; he can be served there.

(b) We know of no reason why the notice should not be signed by an attorney and no controlling authority has been cited by appellant. If the position of the appellant is correct, that an attorney is an officer of the Court, 3 and the Court's consent is presumed, then there could be no plea to the jurisdiction because a non-resident is not presumed to know the procedure and as soon as he procured the services of an attorney, he waives the jurisdiction. This exception is overruled.

The third and fourth questions as made by appellant's argument, raise this question: Are foreign attorneys, attending Courts in this State, exempt from service of process? The answer is they are. The case of *Breon*

4 v. *Lumber Company*, 83 S. C. 225, settles the question as to parties and witnesses and the same principle applies to attorneys. The words italicized by appellant, "*as a party or as a witness and for no other purpose whatever*," does not mean that no other persons will be exempt, but only those who come with no other purpose except to attend Court are exempt.

The showing here is that the respondent came to South Carolina for no other purpose whatever than to assist in the hearing before Judge Sease.

The judgment of the Circuit Court is affirmed.

8571

STATE EX REL. LINDSEY v. TOLLISON.

OFFICES—RULE—ACTION—JURISDICTION.—This Court has no original jurisdiction to determine the title to an office on a petition and rule to show cause in less than twenty days, where the one in possession of the office demurs to the jurisdiction of the Court on the ground that the proper proceeding is by action.

MR. JUSTICE HYDRICK, MR. JUSTICE WATTS concurring, *thinks, also, that the petition should be dismissed because the proceeding is not of such importance and emergency as to warrant this Court, under its rules, to take jurisdiction in the first instance.*

The CHIEF JUSTICE thinks the petition should be considered because brought in the name of the State by the consent of the Attorney General and the respondent agreed, if demurrer were overruled, to an order of reference of the issues of fact.

Petition in the original jurisdiction of this Court by P. N. Lindsay against E. T. Tollison.

Mr. Kurtz P. Smith, for petitioner.

Messrs. Bonham, Watkins & Allen, contra.

June 6, 1913. The opinion of the Court was delivered by

MR. JUSTICE WOODS. The Court regrets that it cannot, without a violation of the statute law of the State, settle the controversy as to the office of supervisor of registration in this proceeding. But the defendant has interposed a ground of demurrer which seems fatal to the proceeding.

The plaintiff, Lindsey, filed his petition in this Court in the name of the State by leave of the Attorney General, claiming to be one of the supervisors of registration of Anderson county, and alleging that the defendant, Tollison, without authority of law is holding the office and refuses to surrender it. The relief asked was as follows: "The plaintiff prays that this Court, in the exercise of its original jurisdiction, issue its order to the said E. T. Tollison, defendant above named, requiring him to answer and show by what authority he claims to hold and exercise the duties as a member of the board of registration of Anderson county.

"That it be adjudged that the said E. T. Tollison is unlawfully exercising the said office and that he be excluded therefrom, and that it be adjudged that the said P. N. Lindsey is entitled to hold and enjoy said office.

"That the said E. T. Tollison be required to pay the cost of this action, together with a fine, not to exceed two thousand (\$2,000.00) dollars, as the Court may adjudge."

On this verified petition, the Chief Justice made an order, requiring the defendant to show cause before this Court, on 19 May, 1913, why the prayer of the petition should not be granted, and requiring him to serve on the plaintiff's attorney a copy of his answer, on or before 17 May, 1913. The order was not served on the defendant until 14 May, 1913. The defendant appeared and demurred to the jurisdiction, the ground being that the relief sought by the plaintiff could be obtained only by a civil action under sections 462 and 466 of Code of Procedure, and that a civil action could be commenced only by the service of summons in the form prescribed by the Code, requiring an answer to be served in twenty days.

Section 462, and so much of section 466 of Code of Procedure as is germane, read as follows:

462. "The writ of *scire facias*, the writ of *quo warranto*, and proceedings by information in the nature of *quo war-*

ranto, are abolished, and the remedies heretofore obtainable in those forms may be obtained by civil action under the provisions of this chapter. But any proceeding heretofore commenced, or judgment rendered, or right acquired, shall not be affected by such abolition."

466. "An action may be brought by the Attorney General in the name of the State, upon his own information, or upon the complaint of any private party, or by a private party interested, on leave granted by a Circuit Judge, against the parties offending, in the following cases:

1. "When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this State, or any office in a corporation created by the authority of this State."

It thus appears that a proceeding of this sort is an action, and that the provisions of law relating to actions apply to it. It has been held, accordingly, that such a proceeding should not be commenced by a rule to show cause. *Alexander v. McKennie*, 2 S. C. 81; *State ex rel. Parrott v. Evans*, 33 S. C. 612, 12 S. E. 816; *State ex rel. Bruce v. Rice*, 66 S. C. 1, 44 S. E. 80.

Section 177 requires that a civil action shall be commenced by the service of a summons, and section 178 prescribes its requisites, one of which is that the defendant be required to answer in twenty days. It might be said that the rule to show cause, issued by the Chief Justice, was, in substance, a summons, except that it required the defendant to answer in less than twenty days. But the requirement that he should answer in less time was a fatal jurisdictional defect, and for that reason it is inevitable that the proceeding be dismissed.

The judgment is that the petition be dismissed, without prejudice to the plaintiff to bring his action in the manner prescribed by law.

Petition dismissed.

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MR. JUSTICE FRASER *concur*s.

MR. JUSTICE HYDRICK, *with whom concurs* MR. JUSTICE WATTS: Concur in dismissing the petition for the reason stated by Mr. Justice Woods, and for the additional reasons that this case is not of such importance nor does it present such emergency as to call for the exercise of the original jurisdiction of this Court. I think, under the rule heretofore adopted by this Court, it should have been first presented to and heard by a Circuit Judge.

THE CHIEF JUSTICE *dissenting*. The Attorney General has given his consent for the proceedings to be brought in the name of the State, and the respondent's attorney stated in open Court that if the demurrer was overruled, he did not desire further time but was willing for an order of reference to be granted as to the issues of fact.

The respondent has not been deprived of any substantial right, and it will subserve no useful purpose to dismiss the proceedings.

8572

CURRENCE, ADMINISTRATOR, v. SOVEREIGN CAMP WOODMEN OF THE WORLD.

1. INSURANCE—WAIVER.—The acceptance by the Sovereign Camp of the Woodmen of the World of dues of a member of a local camp, after suspension for nonpayment, under the facts of this case, is some evidence of waiver by the Sovereign Camp of failure to file with the clerk of the local camp a certificate of good health when payment was made.
2. APPEAL.—IF FRAUD was made an issue by the pleadings it was decided against defendant by the jury and not reviewable here.

Before SEASE, J., York, November Term, 1912.
Affirmed.

Action by B. J. Currence, administrator of J. Henry Joy, against Sovereign Camp, Woodmen of the World, Defendant appeals.

The defendant answered as follows:

"The defendant, answering the complaint of the plaintiff, respectfully shows to the Court:

1. "The defendant denies each and every allegation in plaintiff's said complaint contained not hereinafter specifically admitted.

2. "This defendant admits it is a fraternal beneficiary association incorporated under the laws of the State of Nebraska, and duly authorized to transact business in South Carolina as such, and, during all the times mentioned in the complaint was doing business in South Carolina acting under the authority of the statute law of this State. The defendant also admits that it has subordinate lodges or camps and that it has such in South Carolina, one of which is and was known as 'Black Jack Camp No. 247,' of which W. M. Joy became a member in August, 1907; but, this defendant alleges that membership in said order and the suspension of members from said order and the restoration of members to said order, and the beneficiary certificates issued to the members of the order and whether the same shall be of force and effect or not, are all governed and controlled by the Constitution, Laws and By-Laws of the Sovereign Camp of the Woodmen of the World, as well as by the Statute laws of the State of South Carolina relating to fraternal beneficiary associations.

3. "Further answering this defendant shows to the Court: That while plaintiff's intestate was accepted as a member of the defendant corporation through initiation in one of its subordinate camps on the 27th of August, 1907, and on said date a beneficiary certificate was issued to plaintiff's intestate, yet the defendant alleges that plaintiff's intestate was suspended on the 1st day of May, 1911,

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for not paying his monthly assessment, which said suspension was authorized and required under Section 109 of the Constitution and By-Laws of the defendant corporation, which said section reads as follows:

Sec. 109. “(a) Every member of this order shall pay to the clerk of his camp each month one assessment payment, as required in section 56, which shall be credited to and known as “Sovereign Camp Fund,” and he shall also pay such camp dues as may be required by the By-Laws of his camp. He shall pay any additional assessments for the Sovereign Camp Fund and camp dues, or either, which may be legally called.

“(b) If he fails to make any such payments on or before the first day of the month following, he shall stand suspended, and during such suspension his beneficiary certificate shall be void.’

4. “That section 115 of the Constitution and By-Laws of the defendant corporation contains the following provisions:

Sec. 115. “(a) Should a suspended member pay all arrearages and dues to the clerk of the camp within ten days from the date of his suspension, and if in good health and not addicted to the excessive use of intoxicants or narcotics, he shall be restored to membership and his beneficiary certificate again become valid.

“(b) After the expiration of ten days and within three months from the date of suspension of a suspended member to reinstate he must pay to the clerk of his camp all arrearages and dues and deliver to him a written statement and warranty signed by himself and witnessed that he is in good health and not addicted to the excessive use of intoxicants or narcotics as a condition precedent to reinstatement, and waiving all rights thereto if such written statement and warranty be untrue.

“(c) Any attempted reinstatement shall not be effective for that purpose unless the member be in fact in good

health at the time, and if any of the representations or statements made by the said applicant are untrue, then said payments shall not cause his reinstatement nor operate as a waiver of the above conditions.'

5. "That on the 4th of July, 1911, one Robert Saye Riddle, the clerk of subordinate camp No. 247, of which W. M. Joy had been a member, attempted to reinstate the said W. M. Joy into membership in said corporation by remitting to said defendant corporation the sum of three dollars, the same being some two months after his suspension and the said W. M. Joy not having given the clerk of said camp a written statement and warranty signed by himself and witnessed that he was in good health, and so on, and the defendant here alleges that at the time of the attempted reinstatement, on the 4th day of July, 1911, the said W. M. Joy was sick of typhoid fever, dying of said dread disease on the 21st day of July, 1911. And this defendant further alleges that under section 7 of an act of the General Assembly of South Carolina entitled 'An act for the Regulation and Control of Fraternal Benefit Associations,' approved February 23d, 1910, it is provided: 'No subordinate body or any of its officers or members shall have the power or authority to waive any of the provisions of the laws and constitution of the association, and the same shall be binding upon the association, and each and every member thereof and their beneficiaries.' and therefore this defendant pleads as a matter of law that the clerk of the subordinate camp, of which W. M. Joy had been formerly a member, could not, by accepting dues from a man then sick unto death, reinstate him in the defendant corporation.

6. "That plaintiff's intestate, having been suspended legally under the Constitution, Laws and By-Laws of the Sovereign Camp of the Woodmen of the World on the first day of May, 1911, for nonpayment of monthly assessments, and his certificate of insurance being void under

the Constitution, Laws and By-Laws of the defendant company during the period of suspension, and said intestate having died without being restored to membership in said order, the beneficiary certificate issued to plaintiff's intestate by the defendant is and was at the death of the intestate null and void and of no force and effect.

7. "But still further answering, the defendant shows to the Court, That after his suspension, plaintiff's intestate solemnly declared to the officers of the subordinate camp of which he had been a member his intention of forever severing his connection with the Woodmen of the World, and defendant alleges that said intestate died without knowing of the efforts made by his friends to restore him to membership; and the three dollars that the friends of the said intestate raised and paid over to the Clerk of the subordinate camp (when they knew that the intestate was sick with the fever whereof he died in a short time thereafter) was forwarded by the said clerk to the sovereign camp, but with no information as to the sickness of the intestate, and as soon as the sovereign camp was informed of the facts and that said clerk had no certificate of the good health of the intestate signed by him and witnessed, the sovereign camp promptly returned the three dollars to the clerk of the subordinate camp, Robert Saye Riddle, who paid it over to the parties who paid it to him in the first instance, and the same was received and accepted by them.

8. "The defendant does, therefore, especially deny that it is liable to plaintiff as administrator in the sum of one thousand dollars and interest thereon from July 21st, 1911, and does especially deny that it is liable to plaintiff as administrator in any sum whatsoever."

Mr. J. S. Brice, for appellant, cites: There is no estoppel by waiver: 25 Cyc. 859, 865, 968, 870; 83 S. C. 264. The reinstatement was procured by fraud: 95 U. S. 326.

Messrs. John R. Hart and Hart & Hart, contra, cite: Fraud must be proved: 25 Am. Dec. 636; 1 K. & J. 671; 15 How. 56; 46 Am. Dec. 120. There was enough here to put defendant on inquiry: 88 S. C. 39; 90 S. C. 175. Same principles apply here as to old line companies: 81 S. C. 155; 80 S. C. 400; 55 S. C. 590.

June 6, 1913. The opinion of the Court was delivered by

MR. CHIEF JUSTICE GARY. In order to understand the facts and the issues raised by the pleadings, it will be necessary to set out a copy of the answer in the report of the case.

The first question that will be considered is,
1 whether there was any testimony tending to show waiver on the part of the defendant.

It was the duty of the clerk of the local camp to make collections for the camp.

Section 93 of the constitution and by-laws of the Woodmen of the World provides, that "it shall be the duty of the clerk to have charge of the records, attend to the correspondence, accounts and literature of the camp, and all miscellaneous matters pertaining to its welfare." (It was admitted that this has reference to the clerk of the local camp).

Subdivision c: "He shall remit all funds due and belonging to the sovereign camp to the sovereign clerk, as by law provided."

It was the duty of the local clerk to make his report to the clerk of the sovereign camp, and to state whether the insured had delivered to him a written statement, that he was at that time in good health.

The clerk of the local camp wrote the following letter to the sovereign camp:

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"Clover, S. C., No. 2.

Camp No. 247, S. C.

Located at Oak Ridge.

"Mr. Jno. T. Yates,

"Dear Sir: Find P. O. order for \$3.00, for reinstatement of Sov. W. M. Joy, Cer. No. 18523. He was suspended on assessment No. 247 and now wishes to be reinstated, and made payment to me this morning, and I made my report yesterday, so I told him I would mail same to you, and if you accepted it, it would be O. K., and if you didn't he could take the matter up with you. Hoping to hear from you in regard to this, at your earliest convenience, I beg to remain,

Yours very fraternally,

ROBERT SAYE RIDDLE,

This July 4th, '11.

Clerk."

This letter shows that the clerk of the sovereign camp knew that the certificate of good health had not been delivered; or, at least gave to him such notice, which if pursued with due diligence, would have led to knowledge of the fact that the certificate had not been delivered, which is equivalent to notice.

It is true that under the provisions of the statute, the local clerk did not have the power to waive compliance with the requirements of the constitution and by-laws; but the testimony tends to show that there was waiver by the *sovereign* camp.

The other question is whether the insured was guilty of such fraud as rendered the policy null and void.

Even if it should be conceded that the question of fraud was made an issue by the pleadings, it was, however,
2 properly submitted to the jury, and their finding is not subject to review by this Court.

Judgment affirmed.

MR. JUSTICE WOODS *concurs in the result.*

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SOUTH CAROLINA WESTERN RAILWAY v. ELLEN.

1. THE PROCEEDING PRESCRIBED BY STATUTE FOR CONDEMNATION OF RIGHTS OF WAY BY RAILROAD COMPANIES is a special statutory proceeding, not in the Circuit Court, but with right of appeal to that Court.
2. *IBID.*—*CONSTITUTIONAL LAW.*—If the statute had provided no right of appeal to the Circuit Court, it would not have satisfied the constitutional provision that the "compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law," but the provision giving the Circuit Judge the right to judge of the sufficiency of the grounds of appeal, contravenes this constitutional provision.
3. *IBID.*—*IBID.*—*ESTOPPEL.*—The corporation is not estopped from insisting that this provision is unconstitutional by invoking the statutory provision, in the first instance. .
4. *IBID.*—*IBID.*—The provision as to appeal is for the benefit and use of both the landowner and the corporation.
Power Co. v. Williams, 85 S. C. 179 and *R. R. Co. v. R. R. Co.*, 57 S. C. 317, distinguished from this case.

Before RICE, J., Lee, ———, 1912. Affirmed.

Proceeding to condemn right of way by South Carolina Western Railway against John H. Ellen. Defendant appeals from Circuit judgment. This case was argued in the Supreme Court at the November term, 1912, but ordered re-argued before the Court en Banc on the — day of June, 1913.

Messrs. Mendel L. Smith and J. B. McLaughlin, for appellant, cite: *Does the statute fully meet the constitutional requirement?* 57 S. C. 317; 58 S. C. 563; 85 S. C. 172; Con. 1868, art. 12, sec. 3; Con. 1895, art. IX, sec. 20; 51 Am. & Eng. R. R. Cas. 669; 4 Rap. & Mack's Dig. Ry. Law, 605; 33 S. C. 483; 59 S. C. 371; Code 1912, 3295; 5 Rich. Eq. 597; 62 S. C. 52. *Does the right of appeal depend on the Judge's view of the reasonable sufficiency of the grounds?* 85 S. C. 172. *Party cannot invoke a statute*

Rep.]

April Term, 1913.

and assail its constitutionality: 57 S. C. 122, 322; 85 S. C. 179.

Messrs. Geo. E. Dargan and Thos. H. Tatum, contra. Mr. Tatum cites: The statute creates no court of record for condemnation: 17 S. C. 82; 57 S. C. 317; 58 S. C. 560; 68 S. C. 560; 85 S. C. 172.

June 6, 1913. The opinion of the Court was delivered by

MR. JUSTICE HYDRICK. Sections 20 and 21 of Article IX of the Constitution are as follows:

Section 20. "No right of way shall be appropriated to the use of any corporation until full compensation therefor shall be first made to the owner or secured by a deposit of money, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law.

Section 21. "The General Assembly shall enforce the provisions of this article by appropriate legislation."

The Civil Code (Section 3292, *et seq.*) authorizes the condemnation of rights of way for railroads, and prescribes, in detail, the manner in which it shall be done, and in which the compensation to the landowner therefor shall be ascertained.

It is sufficient for the purpose of the present inquiry to say that, when the parties do not agree, and it becomes necessary to resort to condemnation, the corporation shall petition the judge of the circuit, who shall order the petition filed in the clerk's office, and the clerk shall, thereupon, empanel a jury to ascertain the amount of compensation. Section 3296 provides, in substance, that either party may appeal from the verdict of the jury to the Circuit Court, and "if the Court shall be satisfied of the reasonable suffi-

ciency of the grounds," an issue shall be ordered and the question of the amount of compensation shall be submitted to a jury in open court.

The railway company instituted this proceeding to condemn a right of way over defendant's land, and have the amount of compensation therefor ascertained. From the verdict of the jury empaneled by the clerk, the company appealed to the Circuit Court, and demanded that the amount of compensation should be ascertained by a jury in that Court. The Court was not satisfied of the sufficiency of the grounds of appeal, but held, nevertheless, that the company had the right, under the section of the Constitution above quoted, to have the compensation ascertained by a jury of twelve men in a court of record, and, holding that the jury empaneled by the clerk was not such a jury, ordered the issue set down for trial in the Circuit Court. The Court held, also, that the company, having pursued the only method by which it could obtain the right of way, and have the compensation to be paid therefor assessed, was not estopped from attacking, as unconstitutional and void, the provision of Section 3296, above quoted, which requires that the Court shall be satisfied of the sufficiency of the grounds of appeal, as a condition precedent to the right of trial by jury in open court. The appeal challenges these rulings.

The first question to be determined is, whether the condemnation proceedings is *in* the Circuit Court, or is merely a special statutory proceeding, with right of appeal

1 to the Circuit Court; for, if the proceeding is *in* the Circuit Court, the requirement of the Constitution that the compensation shall be ascertained by a jury of twelve men in a Court of record has been satisfied; otherwise, if it is not.

Condemnation of rights of way was unknown to the common law. Its origin is statutory. It is, therefore, generally regarded by English and American courts as a

special statutory proceeding. Numerous expressions in the opinions of this Court, and the result of its decisions, show conclusively that we have heretofore regarded it as a special statutory proceeding, not in the Court, until brought there by appeal. Upon no other hypothesis can the decisions of this Court be harmonized.

In *R. Co. v. Ridlehuber*, 38 S. C. 308, 17 S. E. 24, the company denied the right of the landowner to compensation for a right of way over his land, and brought an action to enjoin proceedings instituted by him, under the statute, to have his compensation ascertained. The Circuit Court dismissed the action, holding that the rights of the parties could be settled *in the proceedings themselves*. This Court reversed the ruling, and held that the statute provides only the *manner* in which the right of way shall be taken and the *mode* by which the amount of compensation shall be ascertained, and that the issue as to the *right* to compensation must be determined in an action brought for that purpose. That ruling has been followed ever since.

In *Water Co. v. Nunamaker*, 73 S. C. 550, 53 S. E. 996, the action was for the same purpose. The Court said: "When the right to institute condemnation proceedings is contested, the proper remedy is to bring an action in the Court of Common Pleas in order that the Court may, in the exercise of its chancery powers, determine such right. *Railway v. Ridlehuber*, 38 S. C. 308, 17 S. E. 24; *Cureton v. Railway*, 59 S. C. 371; *Glover v. Remley*, 62 S. C. 52, 39 S. E. 180; *Railroad v. Burton*, 63 S. C. 348, 41 S. E. 451; *Riley v. Union Station Co.*, 67 S. C. 84; *Reynolds v. Railway*, 69 S. C. 481, 48 S. E. 476. These cases show that such action must be regarded as independent, and not ancillary to the condemnation proceedings." On petition for rehearing, in response to appellant's contention that the Court had overlooked the distinction between ancillary and independent suits, the Court said: "The appellant also quotes the language of Mr. Justice Bradley, in *Wood*, 112, in

which, after stating he was unable to find any precedent for a bill for *injunction* to stay proceedings in the same Court, says: 'I cannot see any necessity for it. If any circumstances exist which render it improper or inequitable to carry on proceedings in this Court, they can always be brought to the attention of the Court by motion or petition in the suit. I shall direct the bill as such to be dismissed, but allow it to stand as a petition in the several suits sought to be suspended. Supposing the matter to be properly brought before the Court, on petition and motion thereon, the question arises whether the proceedings in this Court ought to be stayed.' *Conceding that these principles would prevail if the action herein and the condemnation proceedings were in the same Court, they are not applicable, for the reason that this action was commenced in the Court of Common Pleas, while the condemnation proceedings were instituted in a special statutory tribunal from which an appeal may be taken to the Court of Common Pleas.*" (Italics added.) This case is directly in point, and seems to be conclusive of the question.

If the statutory proceedings were *in* the Court, the Court would not entertain a separate action to enjoin them, for the Court has control of any action or proceeding pending therein. In such cases, the remedy is by motion *in the cause*. *Ins. Co. v. Mobley*, 90 S. C. 552.

That the parties are given the right to appeal to the Circuit Court shows clearly that the legislature did not regard the proceedings as one in the Court. It would be somewhat anomalous to allow an appeal to a Court from a proceeding in that Court.

The authorities are practically agreed that, when a constitution or statute speaks of a jury, without qualifying words, it means a common law jury of twelve men, presided over by a Court. But, as statutes in some States provide for "a jury of view," or "a jury of appraisers," etc., in condemnation proceedings, no doubt the framers of our

Constitution, desiring to make plain their intention that, in this State, the parties to such proceedings should have the right to the final decision of a common law jury, undertook to do so by qualifying the word "jury," by adding that it should consist of "twelve men," and sit "in a court of record," which, of course, carries with it the idea that it shall be presided over and instructed by a judge.

In *Archer v. Board of Levee Inspectors*, 128 Fed. 125, the Court held unconstitutional a statute of Arkansas which provided that, on the complaint of any person aggrieved by the running of a levee through his land, the sheriff of the county should summon a jury of six landowners who should assess the damages and whose decision should be final. The provision of the constitution of Arkansas on the subject was in substance the same as that of our constitution, and almost in the same words. It read as follows: "No property, nor right of way shall be appropriated to the use of any corporation until full compensation therefor shall be first made to the owner in money, or first secured to him by a deposit of money, which compensation, irrespective of any benefit of any improvement proposed by such corporation, shall be ascertained by a jury of twelve men, in a Court of competent jurisdiction, as shall be prescribed by law."

The reasoning of the Court is so clear and strong that we quote from the opinion at length:

"But it is urged that this act provides for the assessment of damages by a jury. It is true, the act does call the persons who are to assess the damages a jury; but it provides for only six jurors, when the constitutional provision requires a jury of twelve. It is unnecessary to determine whether, if that were the only defect in the act, the Court could not disregard the provision limiting the jury to six, and have the issues tried by a jury of twelve. But is the sheriff's jury provided for by that act a jury, within the meaning of the constitutional provision? A trial by jury,

as defined by the Supreme Court of the United States in its latest opinion, is as follows:

“Trial by jury, ‘in the primary and usual sense of the term at the common law and in the American Constitutions is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and empaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and, except on acquittal of a criminal charge, to set aside their verdict if, in his opinion, it is against the law or the evidence. This proposition has been so generally admitted and so seldom contested that there has been little occasion for its distinct assertion.’ *Capital Traction Co. v. Hof*, 174 U. S. 1, 13, 19 Sup. Ct. 580, 585, 43 L. Ed. 873.

“Merely calling it a jury does not make it so. The duties of the sheriff’s jury, as defined by the act, are merely those of commissioners. There is no provision for a superintendence by a judge. No one is authorized to instruct them on the law, to advise them on the facts, or to set aside their verdict if it is against the law and evidence. How is the sheriff’s jury to know what items are to be considered by them as elements of damage? No provision is made by the act for anyone to instruct them as to the law, nor is anyone authorized to set aside their verdict, even if it should appear conclusively that the verdict was the result of prejudice, passion, partiality or misconstruction of the law.

“It may be conceded that a proceeding before such a body is not violative of a constitutional provision requiring a trial by a jury, if an appeal can be taken from the decision of that body to a court of record, where a trial *de novo* may be had by a constitutional jury of twelve men, under the superintendence of a judge. But the act not only fails to provide for an appeal, but expressly declares that the find-

ings of the sheriff's jury 'shall be final in the premises.' This section of the act is, therefore, clearly in conflict with the constitution of the State."

Appellant relies upon the remarks of the late Chief Justice McIver, in *R. Co. v. R. Co.*, 57 S. C. 322, 35 S. E. 553, but concedes that they were obiter. Properly understood, however, the argument of the learned judge supports respondent's contention. In that case, the Circuit Court was satisfied of the sufficiency of the grounds of appeal. There was, therefore, no room for the contention that the defendant who appealed from the verdict of the clerk's jury, had the right to a trial by jury in open court, without regard to whether he had satisfied the Court of the sufficiency of his grounds of appeal or not. But the contention there was that the whole statute was unconstitutional and void, because the jury trial therein provided for was not a jury trial "in a court of record," as required by the constitution. In response to that contention, the learned Chief Justice proceeded to show that the statute prescribed certain preliminary steps, which, if complied with, will enable the parties to obtain a jury trial "in a court of record," which satisfies the constitution, as we shall presently show. The Chief Justice said: "It will thus be seen that the statute makes such provisions as will secure to either party every right guaranteed to him by the constitution, provided he complies with the provisions 'prescribed by law' for such purposes. * * * If a party, through his own neglect or omission, fails to obtain in a case like this, or, indeed, in any other case, a right of trial by jury in open court, or any other right guaranteed to him by the constitution, by neglecting to pursue the mode prescribed by law for that purpose, it is not the fault of the law, but the fault is his own." In that case, it was the defendant's own fault that it failed to get a jury trial in open court, because it did not serve its grounds of appeal.

That Chief Justice McIver did not have in mind, in his discussion of the question raised in that case, the same point

we are now considering is clearly shown by his remarks in the subsequent case of *R. Co. v. Johnson*, 58 S. C. 560, 36 S. E. 919, which was an appeal from an order submitting the issue of compensation to a jury in the Circuit Court. After showing why this Court would not review the ruling of the Circuit Court that it was satisfied of the sufficiency of the grounds of appeal, he said: "Indeed, we may say, though the point has not been raised in this case, and, therefore, is not properly before us for decision, that it is, at least, doubtful whether, under the provisions of section 20 of article IX of the present constitution, a person who has taken an appeal to the Circuit Court in the manner prescribed by the statute, in a case like this, can be denied the right to have the issue of the amount of compensation which should be allowed him tried 'by a jury of twelve men, in a court of record, as shall be prescribed by law.'"

If the legislature had provided no right of appeal, would the proceedings have satisfied the constitutional requirement? Can it be supposed that the framers of the constitution intended that a matter which was deemed so valuable and important as to be made the subject of a constitutional guarantee should be finally decided by a jury
2 circumstanced as the clerk's jury ordinarily is? It is usually composed of men who are ignorant of law and the rules of evidence, and without experience in legal procedure. They have no power to punish for contempt of their proceedings, which may, therefore, be affected by irregularities which would utterly vitiate a trial by jury in any court. There is no way by which the jury can be protected from improper influences. There may, and often do, arise nice questions of law as to the elements of just compensation and special damages, and as to the relevancy and competency of evidence. Left to themselves in the decision of such questions, grave injustice might result. These are mentioned merely as considerations tending to show that the framers of the constitution did not intend that their verdict should be

final. On the other hand, perhaps, in a considerable majority of the cases, the matter of ascertaining the compensation is simple and a satisfactory conclusion may be reached merely by viewing the land, and their verdict is satisfactory to all concerned.

This leads to the consideration of the suggestion that, if the clerk's jury is not a jury in a court of record, then its work is a nullity. By no means. It is a convenient and often satisfactory step in the proceedings which, if pursued according to the statute, will ultimately result in a trial by jury in open court, if either party desires it. Moreover, the verdict is *prima facie* correct, and furnishes a basis upon which the compensation may be secured by a deposit of money, and thereby prevent needless delay in the progress of the work. "An act is not unconstitutional which provides for an assessment of damages in condemnation proceedings in the first instance by commissioners, viewers, or appraisers, where a right of appeal is secured to a court where a jury trial may be had; and this rule applies even where a jury trial in such proceedings is expressly guaranteed by the constitution, but the appeal must be allowed to a court where the jury of twelve can be had." 24 Cyc. 195; 6 A. & E. Enc. L. (2d) 981; *Faust v. Bailey*, 5 Rich. 107; *Gregory v. Rhoden*, 24 S. C. 97.

The same authorities hold that, if the guaranteed right is not allowed in the first instance, but only on appeal, neither the right of appeal nor the right of jury trial on appeal must be hampered or fettered by unreasonable restrictions. Reasonable restrictions, such as the requirement that notice and grounds of appeal shall be given within a specified time, are permissible, because they are usual and necessary to due and orderly procedure, and the parties can certainly comply with them, and if they fail to obtain the right guaranteed to them, as said by Chief Justice McIver in *R. Co. v. R. Co.*, *supra*, it will be their own fault and not the fault of the law. But a provision which makes the enjoyment of the right depend

upon the judgment or discretion of the judge is unreasonable, because it may result in depriving the parties of the right *without fault on their part*. Therefore, it so burdens the right as to destroy the full force and effect of the guarantee. It follows that the condition imposed by the statute is violative of the constitution.

We next consider whether the company is estopped, because it instituted the proceeding under the statute, from taking the position that the condition in question is void. The company does not contend that the statute is wholly void. Its contention is merely that a single and

3 separable part of it is void, which is not inconsistent with the main purpose and scheme of the act. There is, therefore, nothing in that position which, according to any principle of the law of estoppel or of justice, should work an estoppel. The general principle that one who voluntarily proceeds under a statute and claims benefits thereby conferred will not be heard to question its constitutionality to avoid its burdens, is conceded, and its soundness is not questioned. And, as corporations have no right to exercise the power of eminent domain, except as it may be granted them by the State, in the absence of constitutional restrictions, the legislature may impose upon the exercise of the right by them just such conditions as it may see fit. The corporation may accept the privilege with the conditions imposed, or not at all; but it will not be allowed to accept the privileges and reject the conditions. *Gano v. Minneapolis, etc., R. Co.*, 89 Am. St. R. 393. But that principle is not applicable in this case, because the framers of the constitution expressed the intention that the privilege of condemnation should be accompanied by the right to have the compensation ascertained by a jury in a court of record. The granting of the right to trial by jury in a court of record is imposed by the constitution as a condition or restriction upon the power of the legislature to grant the privilege of condemnation. In other words, the privilege cannot be

granted, unless the right is secured. The one must accompany the other.

The makers of the constitution knew that the privilege of exercising the power of eminent domain depended upon the legislative will and action. They knew, also, that that right had for many years been granted, and would, of necessity, be granted in future for the development of the State's resources. In the face of that knowledge, the language of section 20, above, carries both a prohibition and a command to the legislature, to wit: You shall not grant to any corporation the right to appropriate any right of way, until full compensation therefor shall be first made to the owner, or secured by a deposit of money; and that compensation shall be ascertained by a jury of twelve men in a court of record, as shall be prescribed by law.

The statute affords the only means whereby compensation for rights of way can be ascertain, if the parties cannot agree. This Court has held that where the right to condemn or the right to compensation is not disputed, the mode of ascertaining the compensation prescribed by the statute is exclusive. *Glover v. Remley*, 62 S. C. 52, 39 S. E. 780. This being so, it is clear that, if a party who proceeds under the statute is estopped to say that the condition in question is void, the right guaranteed to accompany the privilege, when granted, is denied without a remedy, contrary to the ancient boast of the law.

The suggestion that the provision for trial by jury was intended for the benefit of the landowner only is not supported by the language used in the constitution, nor by any sound reason that has been advanced. But, even in that view of the case, suppose the landowner were to institute proceedings under the statute to ascertain his compensation, and he is limited to that method in those cases where it is exclusive, would he, too, be estopped? If not, upon what principle could a different rule be applied? Would not the application of a different rule in case of his attack upon the

validity of the provision in question be a violation of that provision of the constitution which guarantees to all citizens the equal protection of the laws?

The question of estoppel is not concluded by the decision in *Power Company v. Williams*, 85 S. C. 179, 67 S. E. 136. In that case, the decision is rested upon two grounds: 1. That which is here invoked, to wit: That the company was estopped to attack the constitutionality of the provision in question, because it had instituted the proceeding under the statute. 2. Because the point had not been presented to or decided by the Circuit Court. This Court has held in numerous cases that questions not presented to or decided by the Circuit Court are not properly before this Court on appeal. It follows, therefore, that when this Court held that the record did not show that the Circuit Court had been requested to rule upon the question, any remarks by this Court upon the question itself were *obiter*, because the question was not properly before the Court. The same is true of the remarks in *R. Co. v. R. Co.*, 57 S. C. 317, 35 S. E. 317, cited in *Power Co. v. Williams*.

THE CHIEF JUSTICE, MESSRS. JUSTICES WOODS and WATTS and CIRCUIT JUDGES ERNEST GARY, GAGE, DEVORE, SHIPP, SEASE and SPAIN, *concur*. CIRCUIT JUDGES PRINCE and FRANK B. GARY, *concur in the result*.

MR. JUSTICE FRASER, *dissenting*. This is a proceeding by the appellant for condemnation of the land of the respondent. The company requiring the right of way over the land of the respondent, procured the necessary order under the statute for a jury to assess the compensation. The jury assessed the value and fixed the compensation at thirty-five hundred dollars (\$3,500.00). From this assessment the railroad company appealed to the Circuit Court and demanded a trial in open court to reassess the compensation. The Circuit Judge held that he was not "satisfied of the

reasonable sufficiency of the grounds," but granted an order for an issue to be tried in open court on the ground that the company was entitled to have the issue tried in open court, under the Constitution. From this judgment the owner appealed on several exceptions and states his questions as follows:

1. "Does the statute regulating [the condemnation of rights of way (section 3292), provide such a method of assessment of damages for the appropriation of a right of way by a corporation, as will fully meet the requirements of section 20, article IX, of the Constitution, which provides that such 'compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law?' In other words, in the language of Mr. Chief Justice McIver in *Railroad Co. v. Railroad Co.*, 57 S. C. 324, 35 S. E. 553, does the statute 'secure to either party every right guaranteed to him by the Constitution?'

2. "Is section 3296, in so far as it makes the right of appeal from the verdict of a condemnation jury dependent upon the determination of 'the reasonable sufficiency of the grounds' of appeal by the presiding judge as a preliminary matter, contrary to the provisions of section 20, article IX, of the Constitution?

3. "Is the respondent estopped from asserting the right, if it exists, to submit the question of compensation to a jury in the Court of Common Pleas, having invoked, at every stage of the proceedings, the condemnation statute?

4. "If such right exists, independently of the statute of condemnation, should it be asserted by a proceeding under the statute, or in the Court of Common Pleas *ab initio*?"

There are two provisions of the Constitution that must be considered.

Article I, section 17, provides: * * * "Private property shall not be taken for private use without the consent of the owner. Nor for public use without just compensation being first made therefor."

Article IX, section 20: "No right of way shall be appropriated to the use of any corporation until full compensation therefor shall be first made to the owner or secured by a deposit of money, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertain by a jury of twelve men in a court of record as shall be prescribed by law."

It will be seen that the first provision is in the "Declaration of Rights," where the most sacred and inalienable rights of the private citizen are secured to him. The second provision is made under the head "Corporations" and is in restraint of corporate power.

If the verdict of the jury "not in open court" does not ascertain the compensation, then the deposit of the amount of their verdict can confer upon the railroad no right to proceed with the taking of the property of the "owner" until the compensation is first paid or deposited. These provisions are mandatory. If this method of ascertaining the compensation provided by statute does not comply with the constitutional provision, then it is unconstitutional and all the court can do is to so declare and dismiss the proceedings. This question this Court need not decide in this case, because the appellant by taking these proceedings has waived its constitutional right to object. It has been held in this State that the constitutional right of the "owner" to prevent the appropriation of the right of way "until full compensation therefor shall be first made to him or secured by a deposit of money," may be waived by the owner.

See *Verdier v. Railroad Co.*, 15 S. C. 483.

The attack is necessarily on the assessment "not in open court." Before the appellant can claim, as a matter of right, a reassessment, it must be held that the compensation has not been ascertained, paid or deposited. If the compensation has not been ascertained in a court of record, by a jury of twelve men, it is because the verdict is a nullity. There is

nothing in the case from which consent to entry before compensation can be presumed.

Railroad Co. v. Railroad Co., 57 S. C. 322, 35 S. E. 553 : "The respondent, by participating in the proceedings prescribed by the statute, without protest or objection up to the time of the hearing before this Court, which is only invested with jurisdiction to review the action of the Circuit Court and by actually basing its application for the order appealed from upon the provisions of the statute, which it now claims is unconstitutional, is estopped from raising the question of the constitutionality of the statute, the benefit of which it has availed itself of. If the position now taken by respondent be tenable, then, it seems to us, its proper course would have been to entirely ignore the statute, which, if unconstitutional, was a nullity, and bring its action against the appellant for a trespass in intruding upon its property without lawful authority. But it certainly cannot be permitted to avail itself of the benefit of the statute and at the same time claim that it is unconstitutional, null and void."

See also *Power Co. v. Williams*, 85 S. C. 179, 67 S. E. 136. Here the respondent took the proceedings under a statute that it now claims is unconstitutional. While it is not absolutely necessary to decide the constitutionality of this statute, yet it is very desirable to do so, and the question fairly arises from the record. In my judgment the statute is constitutional and for the very excellent reasons stated by Mr. Chief Justice McIver in *The Railroad Company v. The Railroad Company*, *supra*, at pages 322-324 :

"But is the statute unconstitutional? In the first place, it will be observed that the provisions of the present Constitution is identical with that contained in the Constitution of 1868, section 3, article XII, and it is very strange that in none of the numerous cases of this kind which arose while the Constitution of 1868 was in force, was this question presented to this Court for decision. True, this is not conclusive; but in view of the intelligent, learned, vigilant and

able bar of which this State can boast, the fact that this question has never before been raised, is entitled to some weight. Let us, therefore, examine for a moment whether the statute under which these proceedings were taken is in violation of the Constitution. The point made seems to be that the Constitution requires that the amount of the compensation "shall be ascertained by a jury of twelve men in a court of record as shall be prescribed by law," whereas, the contention is that the statute contemplated a proceeding by which the amount of compensation may be ascertained by a jury of twelve men, not in a court of record. Now, what are the provisions of the statute? By section 1744 of the Rev. Stat., the first step required to be taken is an application, 'by petition to the judge of the circuit wherein such lands are situated, for the empanelling of a jury to ascertain the amount which shall be paid as just compensation for the right of way required.' The next step is that the said judge shall order the said petition to be filed in the office of the clerk of the Court of Common Pleas, and shall order the said clerk to empanel a jury of twelve to ascertain the compensation. The next step is that said clerk shall empanel a jury of twelve persons in the manner prescribed by the statute. Then, in section 1746, it is provided that the jury so empanelled, after being sworn faithfully and impartially to determine the question of compensation submitted to them, shall proceed to inspect the premises, and to take testimony and ascertain the amount to which the owner is entitled for the use of his land, and render their verdict in writing for the same. Then follows section 1747, copied above, securing a right of appeal from such verdict to the Circuit Court, and prescribing the manner in which such appeal shall be taken, by which the question of the amount of compensation may be submitted 'to a jury in open court.' Then by section 1753, it is provided that all proceedings in relation to the condemnation of lands for the right of way 'shall be filed in the office of the clerk of the Court of

Common Pleas for the county in which such proceedings were had, and shall be there of record.' It will thus be seen that the statute makes such provisions as will secure to either party every right guaranteed to him by the Constitution, provided he complies with the provisions 'prescribed by law' for such purposes. We can scarcely believe that the point made that the word 'shall' in the constitutional provision, 'as shall be prescribed by law,' implies that there must be legislation after the adoption of the present Constitution prescribing the mode of proceeding to be adopted in order to secure a trial 'by a jury of twelve men in a court of record,' can be seriously insisted upon, especially in view of the provision in the first subdivision of section 11 of article XVII, of the present Constitution, 'that all laws in force in this State at the time of the adoption of this Constitution, not inconsistent therewith, and constitutional when enacted, shall remain in full force until altered or repealed by the General Assembly or expire by their own limitation.' Even, therefore, if the constitutional question were properly before us, we would be obliged to say that there was at least grave doubt whether the statute was in violation of the Constitution, and the rule in such cases is well settled that the constitutionality of the statute should be sustained."

But it is stated that this may give the owner a right that is denied to the condemning corporation and violates the equal rights guaranteed to litigants. Is it unconstitutional to allow the defendant more challenges in the Court of General Sessions than is allowed to the State or to provide that a verdict of not guilty is final if in favor of the defendant and not final if in favor of the State? To say that in criminal cases it is different is no answer. In criminal cases there is a difference because the State is a party and the State may and does waive its right to equality.

Here it is said the respondent is a private corporation and as such is entitled to equal rights. The corporation has a dual capacity. It is to some extent public and to some

extent private. In condemnation proceedings it must stand on its public and not its private rights. As a private corporation it can take not a foot of land without the "consent" of the owner. Condemnation proceedings are based on the want of consent.

The property is taken under the State's right of eminent domain and is in theory, at least, a taking by the State. When, therefore, the corporation undertakes to take the property of the owner in the right of the State, it must accept the right with all the limitations the State has seen fit to impose upon itself. There would be no equality if the condemning corporation were allowed all the rights that is granted to it by the State, as the right of the State, and all the rights of a private citizen. In condemnation proceedings the respondent stands solely upon the rights of the State to condemn private property for public use after compensation has first been paid or deposited.

The above answers all the questions properly before this Court.

For these reasons I dissent.

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DILLARD v. DILLARD.

LIMITATION OF ESTATES—WILLS.—Under a devise to my wife "during her natural life and widowhood * * * and at her death or marriage, all the above mentioned property should be sold and equally divided between my three youngest children if living, if not living then to go back to my estate" upon the falling in of the life estate the land is vested in the youngest children surviving the life tenant as a class.

Before DEVORE, J., Greenville, January, 1913. Affirmed.

Action by G. M. Dillard, *et al.*, against M. F. Dillard, as executor of M. G. Dillard, and in his own right, H. L. Dillard *et al.* Plaintiffs appeal. The circuit decree is:

"M. G. Dillard, of Greenville county, died in February, 1876. He had been married twice. By the first marriage he had nine children, and by the second marriage he had three children, to wit: H. L. Dillard, Susie Dillard (now Elmore) and J. D. Dillard. The last mentioned died several years ago, leaving a widow and several children, to wit: Manning Dillard, Bessie Dillard (now Smith), Troy Dillard, Wm. Dillard and Herbert Dillard. The testator's widow, Susan Dillard, died several months before the commencement of this action.

"M. G. Dillard left a will by which he gave to his wife, Susan Dillard, the home tract of land containing 300 acres, more or less, and certain household furniture, and other personal property 'during her natural life and widowhood in lieu of all claims of dower and all other claims in my estate; and at her death, or marriage, all of the above-mentioned property should be sold and equally divided between my three youngest children, if living, if not living, then to go back to my estate.'

"The controversy between the plaintiffs and the defendants relates to that share in the home place to which J. D. Dillard would have been entitled had he lived. The plaintiffs contend that by the terms of the will, this share reverted to the estate and passed under the seventh clause.

"The testator's purpose, as disclosed by the will, must prevail even though it involve the rejection or addition of words, or their restraint from their usual meaning. *Clark v. Clark*, 19 S. C., 352.

"It is clear that the first objects of the testator's bounty, so far as concerns the property involved in the first clause of the will, were his wife, Susan Dillard, and her three minor children. The limitation over in favor of the chil-

dren by the first marriage was to take effect only in case the three youngest children were not living. The executor was directed to sell the land for the purpose of division among the youngest children; but the limitation over was of the land itself, and not of the proceeds of the land or a share in such proceeds. Clearly, these provisions were alternative in their character. On the falling in of the life estate one or the other was to take effect. If the three youngest children were living the land was to be sold and divided among them; if they were not living, the land was to go back to the estate and be divided among the children of the first marriage. The contingency upon which the first limitation was to fall and the limitation over was to arise was the death of the youngest set of children at the falling in of the life estate. The expression 'if not living' clearly has reference to the youngest children collectively and not individually. The limitation over is upon their death.

"The testator dealt with the two sets of children as constituting two classes, or with the younger set collectively. The estate given to the younger set of children was to be defeated only in case they were not living; that is, only in case none of them were living. *Stewart v. Sheffield*, 13 East 526; *Kersh v. Yongue*, 7 Rich. Eq. 100; *Schaffer v. Kettell*, 14 Allen 528.

"The limitation over was to take effect on the death of the three youngest children. It was not intended to become operative while any of these younger children were living. *Shank v. Mills*, S. C. 2-358; *Seabrook v. Mikell*, Chev. Eq. 80.

"It follows from what has been stated that the limitation over has not taken effect and that the plaintiffs can claim nothing under his will.

"H. L. Dillard and Susie Elmore, the survivors of the three youngest children, have by their answer, consented that any interest which they may have in the share which would have gone to J. D. Dillard had he lived, be vested in

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his widow and children. It is, accordingly, so decreed, and it is declared by the judgment of this Court that such interest which they, the said H. L. Dillard and Susie Elmore, may have in the share which would have gone to J. D. Dillard be, and the same is hereby, vested in the widow and children of the said J. D. Dillard.

"In view of what has just been said, it would be idle to discuss the question as to whether under the limitations of the will the share of J. D. Dillard passed to his representatives or to the survivors of the class designated as the three youngest children.

"It is, therefore, ordered and decreed that the widow and children of J. D. Dillard, take among them the one-third interest in the proceeds of the sale of said lands, that is, unto the widow, Minnie Dillard, an interest equal to one-third, and the remaining two-thirds to be equally divided among the children, to wit: Manning Dillard, Bessie Smith, Troy Dillard, Wm. Dillard and Herbert.

"It is further ordered that the plaintiffs pay the cost of this proceeding."

Messrs. McCullough, Martin & Blythe, for appellants, cite: *The surviving brother and sister cannot take under the doctrine of cross limitations*; Moorman's Lim. of Estates 44, 45; 21 S. C. 513; 23 S. C. 224; 57 Am. St. R. 533; 67 L. R. A. 146; 72 S. C. 184. *Interest of deceased brother is not transmissible to his heirs at law*: 16 Cyc. 309; 40 Cyc. 1660, 1683; Moorman's Lim. Estates 23; 87 S. C. 64; 23 S. C. 216; 26 S. C. 472; 25 S. C. 359. *Equitable conversion*: 9 Cyc. 835, 837, 829.

Messrs. Haynsworth & Haynsworth, contra, cite: *Purpose of testator must prevail*: 19 S. C. 352; 4 S. C. 76. *Property converted into personalty*: 23 S. C. 513. *Gift to class*: Jarman on Wills 534; 14 Allen 528; 25 S. C. 358; 59 S. C.

4; 2 McCh. 256, 440; 3 Jarman 372; 13 East 526; 7 Rich. Eq. 100; 99 Mass. 191.

June 10, 1913. The opinion of the Court was delivered by

MR. JUSTICE HYDRICK. The decree of the Circuit Court is affirmed for the reasons therein stated.

8577

GILL v. RUGGLES.

1. SLANDER—EVIDENCE.—In an action of slander statements made by defendant derogatory of plaintiff's character at times other than those alleged in the complaint is competent on the issue of malice.
2. *IBID.*—*IBID.*—OPINION.—In such an action, after a witness has stated the words used by defendant he may give his opinion as to whether defendant was friendly to him.
3. *IBID.*—JUSTIFICATION.—The answer in this case having been treated by plaintiff and the Court as an unqualified plea of justification and the Court so having treated it in his charge without the defense having called his attention to a misstatement of the issues and the answer being much involved, the defendant will not now be heard to say the instruction of the Court as to the effect of failure to prove the plea of justification was erroneous.
MR. JUSTICE FRASER, *the CHIEF JUSTICE concurring, dissents.*
4. CRIMES.—GRAFTING is the fraudulent acquisition of property by using official position for personal gain, and is the statutory crime of breach of trust with fraudulent intent in its worst form.
5. CHARGE—REQUEST.—The beginning of a request "It appears" was properly changed to "If it appears" where the proof is not conclusive of the facts referred to.
6. SLANDER.—In an action of slander, the jury may consider in mitigation of damages whether the defendant made the statements on information which he believed to be true.

Before DEVORE, J., Marion, April term, 1912. Affirmed.

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Action by Chas. E. Gill against Charles F. Ruggles.
Defendant appeals.

Messrs. Washburn, Bailey & Mitchell, W. F. Stackhouse and L. D. Lide, for appellant.

Mr. W. F. Stackhouse and L. D. Lide, cite: Words not alleged should not be proven: 8 Ency. Ev. 292; 3 Hill 175. Defendant did not plead truth as justification: 25 Cyc. 461; 4 Rich. 258. Instruction not applicable to facts in case is error: 66 S. C. 18, 449; 75 S. C. 512; 63 S. C. 559. Charge of grafting is not charging a crime: 3 Rich. 242; 2 Rich. 295.

Messrs. Willcox & Willcox and Henry Buck, contra, cite: Witness may give opinion after stating reasons: 82 S. C. 71. If issues were misstated counsel should have called Judge's attention to it: 62 S. C. 546; 63 S. C. 290; 68 S. C. 392; 72 S. C. 355; 74 S. C. 306; 84 S. C. 568. Defendant must prove truth of crime: 16 S. C. 435. Words imputing crime must be taken in their commonly accepted meaning: 25 Cyc. 355; 2 Rich. 573; 2 Bail. 592; 2 N. & M. 511; 1 N. & M. 290, 215; 25 Cyc. 270, 272.

June 11, 1913. The opinion of the Court was delivered by

MR. JUSTICE FRASER. This is an action for slander. The complaint sets forth three causes of action, but in as much as the trial Judge withdrew the third cause of action from the jury and there is no appeal from his ruling, we will consider only the first and second.

The material allegations of these causes of action are as follows:

"For a First Cause of Action.

Third. "That, as plaintiff is informed and believes, at Marion, in the county of Marion and State of South Caro-

lina, on the 6th day of March, A. D. 1911, the defendant herein in the presence of and to Robert Kickbusch and F. S. Swinbank wilfully, wantonly, falsely and maliciously slandered this plaintiff, in that in the presence of said persons and to them he openly and falsely charged this plaintiff with having grafted and stolen from the Southern Carolina Lumber Company, a corporation chartered and organized under the laws of the State of South Carolina, large sums of money in the sale of lumber for the said Southern Carolina Lumber Company to others and in otherwise robbing said company in numerous ways; that the defendant then and there to said persons falsely charged that said grafting and stealing was done by plaintiff while acting as president of said Southern Carolina Lumber Company, as manager and director thereof, and further falsely accused this plaintiff, as such president, manager and director, of appropriating to his own use large sums of money belonging to the said Southern Carolina Lumber Company, in the following words, to wit: 'Gill has been grafting from the company in the sale of lumber to Sterling Lumber Company, which is Gill & Son, and has been robbing the company in various other ways, and I can furnish the evidence to put him behind the bars if you want to use it;' to plaintiff's damage in the sum of fifty thousand dollars."

"For a Second Cause of Action.

Third. "That at Marion, in the county of Marion, in the State of South Carolina, on the 7th day of August, A. D. 1911, in the presence of H. S. Wunderlich, J. H. Rademaker, Joseph Wightman and L. D. Lide, the defendant, Charles F. Ruggles, openly, wantonly, wilfully, falsely and maliciously slandered this plaintiff by then and there and in the presence of said persons charging this plaintiff with having fraudulently grafted and stolen from Southern Carolina Lumber Company, a corporation chartered and organized under the laws of the State of South Carolina, large sums of money in the purchase of certain machinery

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for said company, in the following words, to wit: "This man, Gill, has grafted from this company in his purchase for the company. No one believes that he paid three thousand dollars for the skidder that he bought, and no one believes that he paid eighteen hundred dollars for the steam loader that he bought, and the same way through all his purchases. You, Gill, are so crooked you have been asked not to sit in any more games of cards at the Carmichael Hotel; you have been grafting and stealing from this company all the way through;" to plaintiff's damage fifty thousand dollars."

The answer denied these allegations and set up that while he had made statements in regard to the plaintiff, yet that the statements which he did make were privileged communications and he believed them to be true, and that they were made without malice. The trial resulted in a verdict for plaintiff for seven thousand five hundred dollars, judgment entered thereon and the defendant appealed on the following exceptions:

I. "Because his Honor erred, it is respectfully submitted, in allowing plaintiff's witness, N. S. Wunderlich, to testify over defendant's objection, as to remarks made by the defendant concerning the plaintiff at times other than
1 those alleged in the complaint, on the ground that such testimony was incompetent and not responsive to the allegations of the complaint, and was prejudicial to the defendant."

This exception does not direct the attention of this Court to the exact evidence complained of. As a general proposition it can not be sustained. In *Morgan v. Livingston*, 2 Rich. Law, p. 585, it is said: "The action of slander is intended not only to recompense a plaintiff for an injury done to his character, but also to punish the defendant for his malice. Any evidence which shows that the slander has been again and again repeated is competent to prove malice. The greater length of time in which the defendant has

repeated his publication, evidences that his words have not been the result of passion and shows a deliberate purpose to injure plaintiff."

II. "Because his Honor erred, it is respectfully submitted, in refusing to strike out the testimony of plaintiff's witness, H. S. Wunderlich, to the effect that defendant never seemed to be very friendly towards the plaintiff 'for a time

2 back,' in that such testimony was incompetent, not responsive to the allegations of the complaint was a mere expression of the opinion of the witness, and was prejudicial to the defendant."

There were two statements by this witness in which he gave his opinion. The motion to strike out applied only to the second statement. At that time the witness had stated the remarks of the appellant, and it was not error to allow him to express his opinion. There are numerous cases that hold this, *Douglas v. Ry.*, 82 S. C. 71 among them. This exception is overruled.

III. "Because his Honor erred, it is respectfully submitted, in charging the jury as follows: 'Where the truth is pleaded in justification, failure to sustain the plea by proof

3 may be construed by a jury as an aggravating circumstance in estimating damages.' I charge you that, where a person said he was justified in speaking the words because they were true, and he fails to establish the truth of them on the trial by evidence, the jury may take that into consideration as an aggravating circumstance in estimating the damages."

"While the defendant, under his plea of justification for the slander, must prove his charge to make the defense complete, the jury, in fixing their verdict, may take into consideration circumstances of aggravation or of mitigation.' I charge you that, as I have already done."

"In action of slander of words imputing a crime to the plaintiff, the defendant, to support a plea of justification, must produce a record of conviction of the crime so

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imputed, or else show the plaintiff's guilt by evidence sufficient to convict him if on trial for such crime; otherwise, the jury must find for plaintiff. A mere preponderance of evidence is not sufficient to sustain the plea.' I so charge you. That means this: It is alleged in the plaintiff's complaint that the defendant charged him with stealing and grafting. Those two things amount to crime in South Carolina. Now, when the defendant undertakes to justify by saying that it is true, then the defendant must prove the truthfulness of that statement and the evidence to establish the truthfulness of that statement must be such as would enable a jury to convict the person of the crime charged if he was on trial for it. That is, the defendant must prove the charge beyond a reasonable doubt, instead of by the greater weight or preponderance of the evidence. In other words, if I were to say to you, Mr. Foreman, that you stole my horse, and said it wilfully, falsely and maliciously, and you were to sue me for slander, and I would undertake to justify, my defense would be a justification; that is, that I told the truth when I said it. When I undertook to prove my defense, I would have to prove your guilt. I would have to prove the charge against you by evidence that would warrant a jury in convicting you if I was on trial for it. That is, I would have to prove it beyond a reasonable doubt."

" 'Where the plea of justification fails because unsupported by evidence, the jury, in estimating the damages may consider this as a circumstance of aggravation, and of continued and express malice.' You may do that."

"The above quoted portions of the charge were erroneous, in that the defendant did not plead generally or specifically the truth of the alleged statements set forth in the complaint, and did not offer any evidence tending to show the truth of such alleged statements, and the said portions of the charge were highly prejudicial to the defendant, in

that the jury naturally inferred therefrom that the burden of proof was upon the defendant to prove the truth of the slanderous words alleged in the complaint to the satisfaction of the jury beyond a reasonable doubt, in order to escape liability, and that the failure so to prove the truth of the said alleged slanderous words would, as charged by the presiding Judge, be a circumstance of aggravation; whereas, the defendant submits: (a) that he did not in his answer admit the use of the slanderous words alleged in the complaint, but on the contrary, denied the use thereof; (b) that he did not plead the truth of the slanderous words alleged in the complaint as justification; (c) that upon the trial, the testimony of the defense tended to disprove the use of the slanderous words alleged in the complaint, and defendant did not attempt in any way to prove the truth of the said alleged slanderous words."

This exception is sustained. The appellant denied the words alleged. He did not allege that the words were true and did not undertake to prove them. The defendant said in his answer, I did not say what you charged me with saying, and put up a witness to attempt to prove that he did not say the things charged. Therefore, to charge the law as to justification was misleading. The respondent says that if the Judge misstated the issue the appellant ought to have called his attention to the error, and having failed to do so, has waived his right to object. His Honor stated the issue correctly and stated that the defendant claimed that the words he did speak were true, to wit: "Whatever words I used on that occasion were true." That differs very widely from justification. Justification is, "yes, I said you stole and you did steal." When his Honor then charged the law as to justification, it was misleading. It is but fair to his Honor, the trial Judge, to say that this answer covers thirty-one and one-half pages of the printed brief, and it is not surprising that some confusion crept in.

IV. "Because his Honor erred, it is respectfully submitted, in charging the jury that 'grafting' is a
4 crime in this State, and that words charging one with grafting are actionable *per se*, in that the word 'grafting' does not necessarily impute a crime."

"Grafting" is not necessarily a crime, and is not a synonym of "stealing." Stealing is the popular word for the technical word larceny.

The Century Dictionary defines "Graft." 2 "Figuratively, something inserted in or incorporated with another thing to which it did not originally belong; an extraneous addition." The word as applied to officials, either public or private, would, therefore, indicate some advantage derived by the officer that was not contemplated or provided for by the appointing power. The advantage may be forbidden by law, and, therefore, a crime. It may not be forbidden by law, and, therefore, not a crime, however improper from an ethical view of the matter. To illustrate: In former days certain officers were entitled to free ferriage by virtue of their offices. Free ferriage was not then graft for these officers, because it was theirs by law and the right to free ferriage was conferred with the office. The legislature might then repeal the law requiring free ferriage. The owners of the ferry might think it to their advantage to continue free ferriage to these same officers for some hoped for advantage to themselves to be derived from a lax enforcement of the law or in the hope of securing new privileges. Free ferriage would then come to the officer as graft. Whatever view one may hold as to the moral of accepting free ferriage, it would not be a crime. The legislature might then seek to destroy the evil effect of allowing the ferry companies to put public officers under obligations to them and forbid the giving and accepting of free ferriage and affix a penalty to it. The acceptance of free ferriage (graft) would then become a crime.

It was the province of the jury to say in what sense the word was used and not a matter of judicial construction. *Morgan v. Livingston*, 2 Rich. Law, p. 283: "If words are susceptible of two meanings, one imputing a crime and the other innocence, the latter is not to be adopted and the other rejected as a matter of course. In such a case, it must be left to the jury to decide in what sense the defendant used them." The converse is equally true, that the Court can not adopt, as a matter of course, that meaning that imputes a crime. It is a question for the jury, and his Honor invaded the province of the jury when he said, in this connection, that if the defendant used the word "grafting," he intended to charge a crime. There is a presumption that where two words are used they represent two ideas. It is true that some men use all the synonyms their vocabularies will afford in the effort to express an idea, but they always fail in exactness and these men are exceptions.

This exception is sustained.

V. "Because his Honor erred, it is respectfully submitted, in modifying defendant's first request to charge, which read as follows: 'It appearing from the evidence that
5 whatever was spoken by the defendant of the plaintiff, so far as the second cause of action set forth in the complaint is concerned, was said at a meeting of the board of directors of the Southern Carolina Lumber Company, of which board both plaintiff and defendant were members, in the presence only of the officers and directors of the said company, in the course of discussions relating to the business and affairs of the said company, such communications were privileged, and the presumption is that there was no malice on the part of the defendant, and in order to recover on this cause of action, plaintiff must show by the preponderance of the evidence that the defendant was actuated by malice towards him in making these said statements.'

The said request was modified by striking out the words "It appearing," at the commencement of the said request and inserting in lieu thereof the words "if it appears," it being submitted that the entire testimony showed without contradiction that the facts set forth in said request were true.

The point here is that his Honor substituted "if it appears" for "it appearing." This exception is overruled. The substitution was proper.

VI. "Because his Honor erred, it is respectfully submitted, in modifying defendant's fifth request, which is as follows: 'If you find from the evidence that whatever was said by the defendant of the plaintiff was based upon

6 information given him by others, and was said in the belief that such statements were true, these facts should be considered by you in mitigation of damages, if you find that plaintiff is entitled to recover at all.' Said request was modified by the addition of the following words: 'You may do it, or you may not do it, just as you view the evidence,' it being respectfully submitted that it was the duty of the jury to consider the facts set forth in the said request in mitigation of damages, if they found such facts to be true."

This exception is overruled. The cases say "may." A rule of law ought never to require the impossible. The jury had limits of one cent and a hundred thousand dollars, and the Court had no right to control their estimate.

I think the judgment of this Court should be that the judgment appealed from be reversed and the cause remanded for a new trial.

THE CHIEF JUSTICE *concurs*.

MR. JUSTICE WOODS. I concur in the opinion of Mr. Justice Fraser, except that I think that the third and fourth exceptions should be overruled, along with the others.

The third exception is very long, and being fully set out in the opinion of Justice Fraser, need not be repeated. It is true the defendant denied in his answer the slanderous words attributed to him in the complaint; but after

3 stating his differences with the plaintiff, he uses this language: "All the matters and things above set forth are pleaded, not only in justification of such statements as defendant did make, but in mitigation of any damages to which plaintiff might otherwise appear entitled." It is conceded by appellant's counsel that if this could be construed into an allegation that there was justification for the statements attributed to the defendant in the complaint because they were true, then the portion of the charge set out in this exception would be correct. I agree with Mr. Justice Fraser that the better construction was that while the defendant denied using the words imputed to him, yet he was justified in using whatever language he did use. But the allegation was not clear, and it was manifestly understood by the counsel for plaintiff and the Circuit Court as an unqualified plea in justification. This is clear from plaintiff's request to charge, as well as the charge itself. Seeing that the Judge misunderstood the pleading and was charging on an issue not made in the answer, it was incumbent on defendant's counsel to call the Court's attention to its mistake. This was not done, and it is well settled that new trials will not be granted in such circumstances.

I cannot agree to the proposition contained in the fourth exception that the Court erred in charging that "grafting" is a crime in this State. It is true, that grafting is not mentioned under that name in the statutes of the State,

4 but the term is always understood to mean the fraudulent acquisition of property by using official position, either public or private, for personal gain, at the expense of those to whom the official duty is owing. This is the statutory crime of breach of trust with fraudulent intent in its worst form.

I think all the exceptions should be overruled and the judgment affirmed.

The majority of the Court having concurred in overruling all the exceptions, the judgment of the Circuit Court is affirmed.

MESSRS. JUSTICES HYDRICK *and* WATTS *concur*.

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STATE v. MATTISON.

1. SELF-DEFENSE—CHARGE.—Where the charge complained of is considered in its entirety it simply means that if as reasonable men the jurors reach the conclusion that the plea of self-defense is sustained by the preponderance of the evidence, they should acquit the defendant.
2. APPEAL—IBID.—Where an error in a charge is patent a party may lose his right to except to it on appeal by not calling the attention of the Court to it.

Before PRINCE, J., Anderson, Spring term, 1911. Affirmed.

Indictment against Jim Mattison for murder. Defendant appeals.

Messrs. Martin, Greene and Earle, for appellant, cite: *Defendant was only required to prove self-defense by preponderance of the evidence*: 72 S. C. 223; 82 S. C. 280.

Solicitor P. A. Bonham, contra.

June 11, 1913. The opinion of the Court was delivered by

MR. CHIEF JUSTICE GARY. The defendant was indicted for murder, and upon his trial, the jury rendered the following verdict: "Guilty of manslaughter, with recommendation to mercy."

From the sentence imposed upon him, he appealed upon the following exception:

"It is respectfully submitted that his Honor, the presiding Judge, erred in charging the jury as follows: 'Mr. Foreman, on the issue of self-defense, if you entertain a reasonable doubt as to where lies the greater weight of the testimony, the plea as an affirmative plea fails, and it is not established because it must be established by the greater weight of the evidence, and if you are in doubt as to where lies the greater weight of the evidence, then it has not been established. But if after considering the whole case, after considering all the evidence adduced on the main issues, the main facts put in issue by the allegations of the indictment and the general plea of not guilty, and after considering all the evidence adduced in support of the issues thus raised, and the issue of self-defense, after considering all the testimony in the whole case, you entertain a reasonable doubt that the party is guilty, give him the benefit of that doubt, and write a verdict of not guilty.'

"The error consists in imposing upon defendant a greater burden of proof, and in requiring of him a greater *quantum* of evidence than the law requires, with respect to his plea of self-defense."

His Honor, the presiding Judge, charged the jury as follows, in regard to the plea of self-defense:

"Where one kills another in the exercise of self-defense, that is an excusable homicide and is not unlawful.

"When may one plead self-defense, and what is the nature of that plea?

"It is an affirmative defense, and the burden of establishing it by the greater weight of the evidence, is on him who sets it up.

"Whenever one attempts the taking of the life of his fellow man, or whenever it is proven to the satisfaction of the jury beyond a reasonable doubt, that one has taken the life of his fellow man, and he seeks in either case to be excused on the ground of self-defense, he must be prepared to prove and he must prove by the greater weight of the evidence ordinarily, these four propositions; * * *

"The question is, has the defendant by his special plea, his affirmative defense in this case, satisfied you by the greater weight of the evidence, that it was necessary or apparently necessary, to take the life of the deceased? * * *

"I said something about the greater weight of the evidence awhile ago. Sometimes that expression is misunderstood by jurors.

"I do not mean by that, Mr. Foreman, the greater number of witnesses testifying to any given fact, because one man may by his superior observation and his accuracy of observation, by his higher character may put more into one statement, than a dozen others with less accuracy of observation, with less character, would make in a dozen statements.

"When I say greater weight of evidence, Mr. Foreman, I mean the greater amount of truth, when it comes to one or a dozen witnesses, or whether gathered from this witness or that, and it is the honest conclusion of the jury as to what the truth is after considering all the testimony adduced.
* * *

"If you are not satisfied beyond a reasonable doubt that he is either guilty of murder or manslaughter, find him not guilty. Or if you are satisfied by the greater weight of the evidence, that he has made good his plea of self-defense, find him not guilty," thus giving him the benefit of all reasonable doubts on the entire case.

When the charge is considered in its entirety, the only reasonable construction of it is, that his Honor, the presiding Judge, simply meant to instruct the jurors, that if as

reasonable men they reached the conclusion, that the
 1 plea of self-defense was sustained by the preponderance of the evidence, they should acquit the defendant, but, that if there was not a preponderance of the evidence in its favor, then the defendant was not entitled to an acquittal on such ground.

Furthermore, the error was so patent that it
 2 might be successfully contended, that the defendant waived the right to rely upon it as a ground of appeal by failing to call attention to it.

Judgment affirmed.

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BURRISS v. BROCK.

1. **CONSTITUTIONAL LAW—BONDS—SCHOOL DISTRICTS.**—Article II, section 13 of the Constitution requiring a petition of the freeholders of a city or town as a condition precedent to an election for the issuance of bonds does not apply to a school district in an election for issuing bonds for school purposes whether the district is coterminous with the city limits included or not.
2. **BONDS—SCHOOL DISTRICT.**—The legislature may authorize the trustees of a school district to hold an election on issuance of bonds for school purposes without a petition from electors or freeholders.
3. **CONSTITUTIONAL LAW—BONDS—SCHOOL DISTRICTS.**—It is held that the legislature considered in the passage of the act of 28 stat. 355 and provided that the old school district including the city of Anderson and the new territory added thereto by this act shall each bear its proportionate part of the taxes to pay the bonds already issued by the old school district and the additional ones provided therein for acquiring additional school property.
4. **IBID.—28 STAT. 355.**—Said act does not violate the provisions of subsections 4 and 9 of section 34 of article III of the Constitution prohibiting special laws for the incorporation of school districts and the enactment of special laws where a general law can be made to apply.

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5. *IBID.—IBID.*—Nor does the act contravene the provisions of article III, section 17 of the Constitution providing that each act shall relate to but one subject which shall be expressed in its title.
6. *IBID.—IBID.*—Nor does the act confer legislative power on the trustees by providing that the provision as to issuing bonds and enlarging the school buildings should only be put into effect, if the electors voted the amount of bonds and special tax.
7. *ELECTIONS—BONDS—SCHOOL DISTRICTS.*—In such election it is not required that more than one box be provided nor that the old and the section to be added should vote separately and a majority vote in each be required to carry the election.

Petition in the original jurisdiction of this Court by C. O. Burriess *et al.* for injunction against J. A. Brock *et al.*

Messrs. Quattlebaum & Cochran, for petitioner.

Mr. T. F. Watkins, contra.

June 24, 1913. The opinion of the Court was delivered by

MR. JUSTICE HYDRICK. By an Act of the Legislature approved January 5, 1895 (21 Stat. 921), the territory embraced within the corporate limits of the city of Anderson was created a separate school district, and the city was authorized to issue, and did issue, \$20,000.00 bonds, which were designated as school bonds, the proceeds of which were used to purchase lands and erect school buildings thereon. In 1902 these bonds were refunded. In 1903 the city issued \$15,000.00 more of school bonds, the proceeds of which were used to purchase lands and erect buildings thereon for school purposes.

In 1913 the legislature passed an act (28 Stat. 355) entitled "*An act to amend an act to establish the Anderson school district, to authorize the establishment of free graded schools therein, and to provide the means for the equipment and efficient management of the same*," approved January 5,

A. D. 1895, so as to enlarge the said district and authorize the trustees to issue bonds and to provide the means for the equipment and the efficient management of the new district as amended." The italicized portion of the title above quoted is the title of the act of 1895.

The act of 1913 enlarges the old school district of the city of Anderson by annexing certain adjacent territory lying within the boundaries therein designated, and, so enlarged, the school district extends beyond the corporate limits of the city. Among other things, the act authorizes the board of trustees of the new school district to submit to the qualified voters residing therein the question of issuing \$100,000.00 of bonds, and provides that \$35,000.00 of the bonds so issued shall be exchanged for, or used to pay the \$35,000.00 of school bonds issued by the city of Anderson, and the balance for the purpose, of improving the present school property, acquiring additional property and erecting buildings for school purposes.

The title to all the property procured by the proceeds of the \$35,000.00 of school bonds issued by the city of Anderson is in the trustees, who were continued in office by the act of 1913 and made trustees of the new school district; and, under that act, all the property of the old school district becomes the property of the new school district. No part of the territory annexed to the old school district was under any bond debt for school purposes, nor was there any school property therein, so that the new district acquired no school property from the annexed territory.

At the election ordered by the trustees, only one box was provided, which was at the courthouse, in the city of Anderson, where all the voters of the district had to vote.

The election resulted in favor of issuing the bonds, and the trustees, having advertised for bids for so much of them as are to be sold this action was brought to enjoin the issuing thereof.

The first objection made is that the act of 1913 violates section 13 of article II of the Constitution, in authorizing the trustees to hold an election on the question of

1 issuing bonds without requiring, as a condition precedent of such election, a petition of a majority of the freeholders of the district. The section in question reads: "In authorizing a special election in any incorporated city or town in this State for purpose of bonding the same, the General Assembly shall prescribe, as a condition precedent to the holding of said election, a petition from a majority of the freeholders of said city or town as shown by its tax books, and at such elections all electors of such city or town who are duly qualified for voting under section 12 of this article, and who have paid all taxes, State, County and municipal, for the previous year, shall be allowed to vote; and the vote of a majority of those voting in said election shall be necessary to authorize the issue of said bonds."

Even a casual reading of this section shows that it is not applicable to the election authorized by the act, which was not in any incorporated city or town, in the sense in which those words are used in the Constitution, nor for the purpose of bonding the same, but it was in a special school district, which was not even coterminous with the city, though it would have made no difference if it had been, because the purpose of the election was the bonding of the school district, and not the city. The Constitution (Sec. 5, Art. X) contemplates the issuing of bonds by different political division or municipal corporations extending over the same territory or parts thereof.

There is no provision in the Constitution which requires a petition of freeholders as a condition precedent to an election on the question of issuing bonds of a school district, as that above quoted with regard to issuing city or town

2 bonds. Section 1743 of the Civil Code of 1912 requires a written petition of at least one-third of the resident electors and a like proportion of the resident free-

holders of the district as a condition precedent to such an election. But the act of 1913, being of later date, though it contains no repealing clause, yet, as it deals with the same subject in so far as it effects the election in question, and as it expressly authorizes the trustees to hold the election and does not require such a petition, necessarily has the effect of repealing so much of section 1743 as is inconsistent with its own provisions.

The petitioner's next contention is that the act of 1913 violates section 5 of article XI of the Constitution, which provides: "That when any school district laid out under

this section shall embrace cities or towns already
3 embraced into special school districts in which graded school buildings have been erected by the issue of bonds, or by special taxation, or by donation, all the territory included in said school district shall bear its just proportion of any tax that may be levied to liquidate such bonds or support the public schools therein." The specific objection urged is that the act fails to provide that all territory included in the new district shall bear its just proportion of any tax that may be levied to liquidate the \$35,000.00 of bonds issued by the city of Anderson. The act does provide, impliedly, at least, that all the territory in the new district shall bear its just proportion of such a tax, for it provides that the tax for that purpose shall be levied upon all the property of the district as assessed for taxation for all other purposes. It is suggested, however, that the newly annexed territory should pay a greater proportion of the \$35,000.00 than the old, and this because the old territory already owned the property acquired by the use of the proceeds of those bonds, while the new territory owned no property at all. But it must be remembered that the bonds have not been paid, and that they are presumed to represent the value of the property. There is nothing to show that it has increased or decreased in value since it was purchased. Therefore, as to that property, the two sections of the new district stand

on the same footing as if the property had just been purchased. While the old territory has been taxed to pay the interest on the bonds since they were issued, the citizens thereof have had the use of the property as compensation thereof. Moreover, in the absence of any showing to the contrary, the Court will presume that the legislature considered that matter and obeyed the mandate of the Constitution, and imposed upon each section of the new district its just proportion of such tax.

The next contention is that the act violates subdivisions 4 and 9 of section 34 of article III of the Constitution. That section prohibits local or special legislation on certain subjects. Subdivision 4 prohibits any local or special law "to incorporate school districts," and subdivision 9 provides that "where a general law can be made applicable, no special law shall be enacted." These objections are met and answered by the decisions of this Court in *State v. McCaw*, 77 S. C. 351, 58 S. E. 145, and *State v. Brock*, 66 S. C. 357.

The objection that the act relates to more than one subject and that the subject thereof is not expressed in the title, contrary to the provision of section 17 of article III of the Constitution is also untenable, as will clearly appear from a consideration of the title and the provisions of the act. This provision of the Constitution requiring that every act shall relate to but one subject which shall be expressed in the title has been so fully and so frequently expounded and applied that it would be useless to attempt to add anything upon that subject. See *Dove v. Kirkland*, 92 S. C. 313, 323, 75 S. E. 503, and cases cited.

The last objection to the act upon constitutional grounds is because it confers upon the board of trustees power to suspend the operation thereof, if the result of the election should be against issuing the bonds, thereby, as it is alleged, conferring upon the trustees legislative power. The language relied upon to sustain this

objection is as follows: "As it will be impracticable to carry out the amendment herein provided for if the voters of said district should refuse to authorize the issuing of bonds herein provided and for the special school tax, the trustees are hereby authorized to suspend this amendment and to carry on schools according to the provisions of the original act until such time as the qualified voters shall authorize said bonds issued and said special tax levy, at which time the said board of trustees shall operate under this amendment." As the contingency upon which the trustees were authorized to suspend the act did not and cannot arise, since the voters did authorize the issue of bonds, it would seem that the question raised by this objection has become academic, but, properly construed, the act does not confer legislative power upon the trustees, because the legislature itself prescribed the contingency, upon the happening of which the amendment should be suspended. No discretion to suspend the amendment was vested in the trustees. The language above quoted was intended merely as a direction to them as to the course which they should pursue on the happening of the contingency named.

It was properly conceded that there is nothing in the fact that only one voting place was provided for holding the election. We know of no law, constitutional or statutory, and none has been cited, which required more than
7 one voting place. Indeed, the act of 1895, of which the act of 1913 was only an amendment, required that the elections therein provided for should be held at the courthouse in the city of Anderson. It was suggested that separate voting places should have been provided for those residing in the new territory and those residing in the old, and that a majority of each section should have been required. It is sufficient to say that the legislature did not so require, and we see no good reason why it should have done so.

The petition is dismissed.

8582

LYKES v. SEABOARD AIR LINE RY.

WHERE AN APPEAL FROM A MAGISTRATE COURT has been on the docket in the Circuit Court for a general and special term of Court and the respondent has at each term endeavored to have it heard, the Court may on his motion dismiss the appeal at the next regular term for want of prosecution.

Before SPAIN, J., Hampton, February term, 1913.
Affirmed.

Action by F. M. Lykes against Seaboard Air Line Railway in court of Magistrate M. F. Long. Defendant appeals from Circuit order dismissing appeal.

Messrs. Lyles & Lyles, for appellant, cite: 82 S C. 350.

Mr. C. B. Searson, contra.

June 28, 1913. The opinion of the Court was delivered by

MR. JUSTICE FRASER. This is an appeal from the magistrate's court. The following appears in the case: "The appeal was not heard at the regular October term, 1912, and the presiding Judge marked the same 'continued' on the Calendar, nor was the said appeal heard at the December special term of the Court of Common Pleas for the said county, the presiding Judge at that term making no entry upon the Calendar as to what disposition was made of the appeal. At February term, 1913, Judge T. H. Spain passed an order dismissing the appeals. From this order notice of intention to appeal to the Supreme Court was duly served, and this appeal is now taken."

Order of Circuit Judge:

"The above case comes up before me on motion by plaintiff's attorney to dismiss the appeal herein, heretofore ren-

dered on the 16th day of August, 1912, in the court of magistrate M. F. Long, which was rendered on the above date, from which said order awarding plaintiff the sum of money therein named, defendant appealed to this Court, and it appearing that said case has been upon the proper Calendar for the third term and that plaintiff's attorney has, at each term, endeavored to have the said appeal heard, and that defendant has failed to prosecute the said appeal and have the same disposed of after several opportunities to do so, now, on motion of C. B. Searson, Esq., plaintiff's attorney, it is ordered that the appeal heretofore made in the above entitled cause be, and the same is hereby, dismissed for want of prosecution upon the grounds above set out, and that the judgment of the magistrate heretofore rendered be, and the same is hereby, confirmed and made the judgment of this Court."

Exceptions:

1. "It is submitted that his Honor, the Circuit Judge, erred, as a mater of law, in holding and so deciding that it was incumbent upon him to dismiss the appeal after the second term, when the cause had been continued on the Calendar at regular October term, and has been passed over at special December term."

In order to sustain the appeal the appellant quotes the following from *York Supply Co. v. Southern Ry. Co.*, 82 S. C. 350, 64 S. E. 387:

"'Hearing Upon Return.'—If a return be made, the appeal may be brought to a hearing by either party. It shall be placed upon the Calendar and continue thereon until finally disposed of. But if neither party brings it to a hearing before the end of the second term, the Court shall dismiss the appeal, unless it continue the same by special order, for cause shown. At least eight days before the Court, the party desiring to bring on the appeal shall file the return and accompanying papers, if any, with the clerk, and the clerk shall thereupon enter the cause on the Calendar, accord-

ing to the date of the return, and it shall stand for trial without any further notice."

In the York Supply Company case, the Court says: "To justify dismissal without a hearing it must appear that the case was *called for trial* (italics ours) at the second or some subsequent term, and that neither party, after such opportunity to be heard, brought it to a hearing or had it continued for cause."

The Court goes on to say: "In this cause it did not appear that the case had ever been called for trial by the Court until the term it was summarily dismissed for want of prosecution. The statute never contemplated a summary dismissal without an opportunity to be heard. The usual and orderly way for the Court to give such opportunity is to call the docket of cases. With a view to enforce the statute, it might be well for the Court, after calling the docket, to make some entry therein indicating that the case had been called and what disposition was made of it, so that the foundation for a summary dismissal may be properly evidenced. The Court will not indulge a presumption that cases on appeal from magistrate Court were called at the second term and opportunity presented for a hearing."

In this case the Circuit Judge finds the facts against the appellant when he finds "That plaintiff's attorney has, at each term, endeavored to have the said appeal heard and that the defendant has failed to prosecute the said appeal and have the same disposed of after several opportunities to do so."

In the case to which we have been referred, the Court merely stated what would be the best practice, but did not say it was necessary.

The judgment appealed from is affirmed.

8584

B. T. RUSHING & CO. v. SEABOARD AIR LINE RY.

Ruled by case of Lykes v. Seaboard Air Line Ry., infra.

Before SPAIN, J., Hampton, February term, 1913. Affirmed.

Action by B. T. Rushing & Co. against Seaboard Air Line Railway, in court of Magistrate M. F. Long. Defendant appeals from Circuit order dismissing appeal from magistrate.

Messrs. Lyles & Lyles, for appellant.

Mr. C. B. Searson, contra.

June 28, 1913. The opinion of the Court was delivered by

MR. JUSTICE FRASER. This case was heard with the case of *Lykes v. Seaboard Air Line Railway*.

The facts are the same, and the judgment herein is affirmed for the reason stated in that case.

8585

STATE v. PUCKETT.

BURGLARY.—Entering in the nighttime a piazza to a dwelling enclosed by a low balustrade and picket gates to keep out dogs and chickens, there being no evidence of intent to steal, is not such an entry as will support an indictment for burglary at common law.

Before PRINCE, J., Laurens, January term, 1913. Reversed.

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April Term, 1913.

Indictment against Rich Puckett for burglary. Defendant appeals.

Messrs. Ferguson, Featherstone & Knight, for appellant, cite: *Common law burglary*: 2 Bish., Sec. 91; 12 S. C. 568; 2 Whar., Sec. 971; Clark's Crim. L., Sec. 100. *Piazza not a part of the dwelling*: 39 Ala. 679; 6 Words and Phrases, 5376. *Indictment must set forth every fact necessary to constitute crime*: 2 Whar. 1229; 6 Cyc. 199, 220, 231; Clark Cr. Pro. 162; 14 S. C. 353; 1 Rich. 184, 18 S. C. 138; 45 S. C. 488; 47 S. C. 5. *Entering door ajar or window partly raised*: 2 Bish. Cr. L., Sec. 91; 2 Whar., Sec. 971; 32 S. C. 21; 13 Ived. 244; 1 N. J. L. 439; 105 Mass. 588; 68 Ala. 539. *Breaking out*: Clark's Crim. L. 234; 2 Whar. Cr. L. 1200; 5 Ency. 67; 5 Baxt. 569; 55 Ala. 123; 51 Ga. 285; 82 Pa. St. 306; 70 N. C. 239; 29 S. C. 81; 64 S. C. 348.

Solicitor R. A. Cooper, contra.

June 30, 1913. The opinion of the Court was delivered by

MR. JUSTICE WATTS. The defendant-appellant was tried and convicted in the Court of General Sessions for Laurens County, on January, 1913, on a charge of burglary. He was charged with breaking and entering the dwelling house of W. R. Richey, in the night time, with intent of committing a felony, on September 22, 1912. After conviction, a motion for a new trial was made by appellant, which was overruled and after sentence, appellant appeals and alleges ten specifications of error on the part of his Honor. The first five exceptions allege error on the part of his Honor, in overruling the motion for a new trial, in that there was no testimony to sustain the verdict, as the evidence showed that the portion of the house entered was the piazza, unprotected and unenclosed, and was not such a place as to be legally the subject of burglary, and there was no evidence that the

defendant broke and entered a dwelling house as alleged in the indictment, and in holding that picket gates, in contemplation of law, put on the piazza outside of the house, constituted a protection or security, to the habitation of the dwelling, when the evidence showed that the gates were not put there for any such purpose, but to keep out dogs and chickens, and in holding that under the indictment, the appellant could be convicted of burglary in breaking out of said dwelling house when there was no evidence of such breaking, and for the further reason, there was no evidence of any breaking or entering in the house to steal, no breaking out, and no evidence at all of any theft, or other felony, committed by the appellant, in consequence of such entry.

The ninth and tenth exceptions raise the point, there was no evidence to sustain the verdict. The facts, as developed at the trial in brief are: That the dwelling house of Mr. Richey is on West Main street, in the city of Laurens; that the house is surrounded on the front and on the east and west ends by a piazza, with balustrade two and one-half feet high. From the top of balustrade to the overhead ceiling of the piazza is an open space of six or seven feet. On the front there was an opening on the piazza of twelve feet through the balustrade. On the east and west ends there was an opening of eight feet from the back yard on each end of the piazza. There was a picket gate to each end opening of the same height as the balustrade, leaving the space above open to the ceiling. It was the custom to keep these gates closed to keep out chickens, dogs, etc. The evidence shows the defendant-appellant was familiar with the premises. On the night in question, it was damp and raining. During the night Puckett was found on the piazza of the house under suspicious circumstances. There is no question about that, and there was sufficient testimony to go to the jury, as to whether the gates to the piazza were closed or not. He did not enter the dwelling house proper at all, and there is no evidence that he stole anything, or

made any overt act to commit a felony. The sole question is whether the piazza was such a part of the dwelling house in this case, under the facts as proven as to make it a subject of burglary, and if so, did the appellant break and enter it in the night time with intent to steal, or did he enter it without breaking in the night time, with intent to steal, and then break out. Common law burglary is the breaking and entering the dwelling house of another in the night time, with intent to commit a felony. There must be a breaking and entering. It must be a dwelling house, it must be in the night time, and it must be with the intent to commit a felony. There must be a breaking of "The enclosing parts of a dwelling house." 2 Bishop, Sec. 91; *State v. Sampson*, 12 S. C. 568; 2 Wharton (11 Ed.) 1190, Sec. 971; Clark's Criminal Law, Sec. 100.

The evidence shows the appellant only on the piazza, and under the facts as proven, it does not show that the piazza was such a part of the dwelling house as was contemplated by law to make it an offence to enter in the night time against the security of the dwelling house. In the case of *Henry v. State*, 39 Ala. 679, "The accused was charged with larceny under the statute imposing a penalty upon 'any person, who shall commit larceny in any dwelling house.' Certain clothes had been stolen from the piazza in front of the dwelling house, and attached to it." The Court held: "Such a piazza is not a house, and cannot be a dwelling house. It may be attached to the house. A larceny committed in the piazza cannot be committed inside a house."

The entry of a piazza attached to the house outside of the house, the place where callers are accustomed to wait until someone in the house responds to a ring or knock, or to enter and sit on the piazza to get out of the rain or sun, or to rest, may be a trespass, or bad taste, but it is quite different from opening the closed doors of a house and intruding in the sanctity of the dwelling.

A careful examination of all the evidence in the case convinces us that there was not sufficient testimony to convict the appellant of the offence charged, and his Honor was in error in not setting the verdict aside. The appellant was not indicted for an attempt to commit a burglary, although 2 Wharton (11 Ed.) 1041, says: "An attempt at burglary is indictable at common law," but appellant was indicted for burglary, not an attempt to commit burglary.

Judgment reversed.

8586

IN RE WILL OF ROTON.

WILLS—MARRIED WOMEN.—The will of an unmarried woman under section 3570, Code of 1912, is revoked by her subsequent marriage and death leaving her husband surviving her, and such will will be declared invalid for all intents and purposes at the instance of the brother of the deceased.

Before DEVORE, J., Lexington, January, 1913. Affirmed.

Proceeding for proof of will of Annie L. Roton, in solemn form. From Circuit decree reversing probate judgment and holding will invalid, executors appeal.

Messrs. Efrid & Dreher, for appellants, cite: *Where a married woman has as much right as a man to hold property her marriage should not revoke her will*: 17 L. R. A. 592; 79 Ill. 99; 70 Wis. 251; 60 N. H. 439; 54 Am. R. 359; 130 N. W. 134; 45 Vt. 145; 81 Me. 275; 52 Am. R. 255; 67 L. R. A. 315. *Our Code of 1902, 1860, applies only to men.*

Messrs. N. W. Brooker and Jno. T. Seibels, contra, cite: *Words in our acts importing masculine apply to females*: Code 1902, 41; 86 Ga. 386; 19 S. E. 759; 141 Mass. 475;

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161 Mass. 177; 170 Mass. 401; 54 W. Va. 545; 1 W. Va. 740; 199 Pa. St. 137. *As to words in will*: 199 Pa. 137; 108 Pa. 76; 138 Mass. 45; 42 Ga. 415. *Who may contest a will*: 40 Cyc. 1241.

June 28, 1913. The opinion of the Court was delivered by

MR. JUSTICE WATTS. This is an appeal from a decree of his Honor, Judge DeVore. The facts of the case show that Annie L. Leitner, then a widow, on August 20, 1906, made a will, and thereafter married Harris Roton, and died in February, 1910, leaving the will in question. Her husband, Roton, her mother, a brother and sister survived her, but no children. On March 15th, 1910, the will was presented to the probate court by the executors, and on that day admitted to probate in common form. On October 23, 1911, the brother of testatrix, to whom she had given \$10, filed his petition for proof of the will in due and solemn form. In obedience to the order of the probate court the executors filed their summons and petition, asking to be permitted to prove the will in due form of the law. The brother of the testatrix alone appeared to contest the will. The probate court admitted the will to probate, holding it valid. From this decree the brother of testatrix alone appealed to the Circuit Court, and the appeal was heard by Judge DeVore, Circuit Judge, who reversed the decree of probate court, he holding that the will was revoked by the subsequent marriage of the testatrix. The executors appeal from this judgment, alleging error, 1. In holding that under our statutes the will is revoked by marriage, and in 2. In not holding that even if the will was revocable by marriage it should not be declared void at the instance of the brother of testatrix.

There is no dispute, and it was conceded at the hearing of this case by appellant's counsel that under the common law, the will of a woman, whatever its provisions, was

revoked by her subsequent marriage. Section 3570, Code of Laws 1912, is, "If any person making a will shall afterwards marry and die, leaving his widow, or leaving issue of such marriage, unless the will shall have been made in contemplation of such marriage expressed on its face, and shall contain a provision for future wife and children, if any, it shall be deemed and taken to be a revocation to all intents and purposes." This act really supplements the common law rule. On the construction of words, section 41 of Code of Laws 1912, Vol. I, is, "The words 'person' and 'party' and other word or words imparting the singular number, used in act or joint resolution, shall be held to include firms, companies, associations and corporations, and all words in the plural number shall apply to single individuals in all cases, in which the spirit and intent of the act or joint resolution may require it. All words in any act or joint resolution imparting the masculine gender shall apply to females also, and all words imparting the present tense shall apply to the future also."

Under these sections there is no doubt that the will of Annie L. Roton, made while she was a widow, was revoked immediately upon her marriage to Roton, and the will being revoked to "all intents and purposes whatsoever," and then she died, as if intestate, and her property is to be divided under the statute of distribution and the exceptions are overruled.

Judgment affirmed.

8587

STOKES v. MURRAY.

REAL PROPERTY—ISSUES.—There being some evidence in this case of a seizure by the plaintiffs or those through whom they claim within the statutory periods and of title from a common source, the issue of title should have been sent to the jury, and nonsuit not granted.

Before HENRY MULLINS, Special J., Lee, March, 1910.
Reversed.

Action by J. L. Stokes *et al.* against William Murray.
Plaintiffs appeal on the following exceptions:

1. "Having established, *prima facie*, a legal title to the premises in question, the plaintiffs were presumed to have been possessed of the same within the time required by law.

2. "Section 109 of the Code of Civil Procedure of 1902 has no application to this case: (a) because not enacted for forty years; (b) because enacted after the cause of action accrued, if the view taken by attorneys for defendant is correct.

3. "Section 98 of the Code of Civil Procedure of 1902 has no application in this suit, as the same was enacted after the cause of action arose, if the contention of defendant be correct.

4. "Section 101 of the Code of Civil Procedure of 1870 is not applicable to this case, because a *prima facie* legal title having been established, the plaintiffs are presumed to have been possessed within the time then required by law, to wit, twenty years.

5. "The statutes of limitation have no application to this case, as no right of action ever accrued to the plaintiffs or their ancestor, until the death of F. L. Stokes.

6. "The statutes of limitation do not apply in this case as the ancestor of the plaintiffs was laboring under the marital disability imposed by law, and the law cannot, at the same time, prescribe a limitation to run during the continuation of the disability the law had imposed, as this would be depriving a person of property without due process of law.

7. "No adverse holding was, or could be, shown, as the plaintiff's ancestor had no right to the possession, and therefore no mere holding of possession could be adverse to her rights, which did not include possession.

8. "Section 101 of the Code of Civil Procedure of 1902 raises the presumption of possession within the time required by law, and this alone would require the trial judge to send the case to the jury.

9. "The evidence introduced by the plaintiffs was sufficient under the law to sustain a verdict for them, and said evidence did make out a *prima facie* case."

Messrs. L. D. Jennings and McLeod & Dennis, for appellants. The former cites: *Possession is presumed to follow title*: 71 S. C. 330. *Presumptions stand as evidence*: 87 S. C. 174; 79 S. C. 71. *Possession of wife before Constitution of 1868 passed to husband*: 48 S. C. 28; 11 S. C. 71; 42 S. C. 84. *Statute does not begin to run until disability removed*: 18 S. C. 526. *Forty-year provision could not apply here*: 78 S. C. 143.

Messrs. Thos. H. Tatum, J. B. McLaughlin and A. B. Stuckey, contra. The latter cites: *Feme covert is limited to 7 years after disability*: 6 Stat. 238. *Was statute properly pleaded?* 24 Cyc. 1408; 1 McC. 336; 30 S. C. 234. *When both husband and wife were disseized, statute began to run against wife*: 3 Rich. 449; 2 Strob. 332; 36 Am. D. 70; 48 S. C. 282. *There is no common source on a general denial by defendant*: 15 S. C. 478; 37 S. C. 102.

June 28, 1912. The opinion of the Court was delivered by

MR. JUSTICE WATTS. This was an action for the recovery of real property heard before special judge Hon. Henry Mullins, and a jury at the spring term of the Court of Common Pleas for Lee County, in 1910. At the close of the evidence in the case, upon motion of defendant's attorneys, his Honor granted a nonsuit. The plaintiffs gave notice of intention to appeal from this order, but before they perfected their appeal, Judge Mullins signed an order setting

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aside his order of nonsuit, and appeal was taken from this last order, and that order was reversed in an opinion recently filed by this Court, with leave to the plaintiffs (appellants here) to perfect their appeal from the order granting the nonsuit. The order of nonsuit appealed from is as follows: "Upon the close of plaintiff's testimony in the above stated case, the defendant moved for nonsuit upon the various grounds stated in the record. It appearing to my satisfaction that the plaintiffs have failed to show that they, or any one of them, their ancestors, predecessors or grantors, were seized or possessed of the premises in question, or any part of such premises, within ten years, or within twenty years, or within forty years, before the commencement of this action, and it further appearing that the evidence, as offered by the plaintiffs is insufficient to sustain a verdict for them, and totally fails to make out their case, it is ordered that the nonsuit in said case be, and is hereby, granted."

The appellants, by their exceptions (nine in number, which should be set out in the report of the case) question the correctness of this holding by his Honor. A careful examination of the evidence in the case forces us to the conclusion that his Honor was in error in not submitting the case to the jury to pass upon the evidence in the case. The order of nonsuit was based mainly upon the statute of limitations and adverse possession. There was a *scintilla* of evidence to go to the jury on these questions, as well as that of common source, of title. Chief Justice McIver, in *Thomas v. Dempsey*, 53 S. C. 218, 31 S. E. 231, says: "The rule is well settled that where the question is, whether a party has acquired title to real estate by adverse possession for a period of ten years, it must be clearly proved and shown." *Rochell v. Holmes*, 2 Bay, 487, *Harrington v. Wilkins*, 2 McC. 289. Where it is said the character of possession is a question for the jury. *Cantey v. Platt*, 2 McC. 260; *Porter v. Kenny*, 1 McC. 206; *Hill v. Saunders*, 6 Rich. 62; *Abel v. Hutto*, 8 Rich. 42. The law is so well settled that

quotation of authority is unnecessary; that where there is any competent relevant testimony to go to the jury, that a nonsuit cannot be granted. We cannot escape the conclusion that there was evidence to go to the jury upon all of the issues that the Judge based his order of nonsuit and that he was in error and order appealed from should be reversed. Judgment reversed.

8588

STEELE v. ATLANTIC COAST LINE R. R. Co.

JOINT TORTS—DEMURRER—MASTER AND SERVANT.—Where a defendant, master, is sued on a several and joint tort, with his servant, charging a concurrent chain of negligent acts combining to produce an injury, demur on ground of misjoinder of causes of action by master will not lie.

Hines v. Jarrett, 26 S. C. 480, distinguished from this case.

Before SEASE, J., Florence, Fall term, 1912. Affirmed.

Action by W. M. Steele against Atlantic Coast Line R. R. Co. Defendant appeals.

Mr. F. L. Willcox, for appellant, cites: 57 Neb. 534; Pom. Code R., Secs. 335, 340, 350; 67 S. C. 499.

Messrs. Ragsdale & Whiting, contra, cite: 55 S. C. 90; 79 S. C. 438; 64 C. C. A. 548; 68 S. C. 55; 67 S. C. 499; 41 Am. R. 182; 166 U. S. 521; 12 L. R. A. (N. S.) 675; 82 N. E. 705; 75 Fed. 691; 100 S. W. 551; 25 N. E. 799; 39 S. W. 695; 85 Pac. 230.

June 28, 1913. The opinion of the Court was delivered by

MR. JUSTICE FRASER. In the argument of appellant there is the following statement of its case:

"This is a suit for damages alleged to have resulted from personal injuries to plaintiff, a switchman and car coupler, while in the discharge of his duties, on the 23d day of December, 1911, in the Florence yards of Atlantic Coast Line Railroad Company. The complaint alleges the bruising, breaking and maiming of plaintiff's left hand and wrist. It further alleges that the injury was caused by the negligence and wrongful acts of defendant in several particulars, to wit: First. In the failure of the defendant, Atlantic Coast Line Railroad Company, to provide safe and suitable appliances. Second. In the wilfullness of both defendants, acting through the defendant, Crumpler, in requiring plaintiff to go into a position of danger and to use unsafe and defective appliances. Third. In the wilfullness of the defendant, Atlantic Coast Line Railroad Company, in causing the cars to be brought together with great force while the coupling devices were out of repair. Fourth. In the failure of both defendants, acting through the defendant, Crumpler, to open the knuckle on one of the coaches in question before attempting to make the coupling; and Fifth. In the wanton and wilful failure of the defendant, Atlantic Coast Line Railroad Company, to make the coupling as the cars came together.

"It will be noted that the negligent acts relied upon to create the liability in favor of the plaintiff are charged, first, against one defendant alone, and then against the two jointly.

"The defendant, Atlantic Coast Line Railroad Company, demurred instead of answering the complaint, basing its demurrer on the ground that several causes of action have been improperly united, this defect in pleading appearing upon the face of the complaint. It charges that a cause of action against it alone for failure to provide suitable appliances, in providing which the defendant, Crumpler, had no part, cannot be joined in the same complaint with a cause

of action against the two defendants for the joint neglect of a duty imposed by law upon both of them.

"Upon hearing the demurrer his Honor, Judge Sease, made an order overruling same, whereupon this appeal was taken upon one exception."

"His Honor erred, it is respectfully submitted, in not sustaining the demurrer interposed by the defendant, Atlantic Coast Line Railroad Company, and in not holding that plaintiff in his complaint had improperly joined two causes of action, one against the defendant, Atlantic Coast Line Railroad Company, for negligent, wanton and wilful failure to provide and maintain safe and suitable appliances for coupling together its cars, this cause of action being against the Atlantic Coast Line Railroad Company only; and another against Atlantic Coast Line Railroad Company and the defendant L. L. Crumpler, jointly, on account of the joint and concurrent, negligent, wanton and wilful order and direction of the defendant, L. L. Crumpler, as agent, and the defendant, Atlantic Coast Line Railroad Company, as principal. He should have held that two such causes of action cannot properly be united in one complaint, and should have sustained defendant's demurrer."

It will be observed that the statement does not show separate acts of negligence, each of which produced separate injuries; but a concurrent chain of negligent acts which combined to produce one injury. The demurring defendant (the Railroad Company) is alleged to be negligent in each link of the chain. Where there are several joint *tortfeasors*, each may be sued separately. If, therefore, the Railroad Company had been sued separately its objection would not apply. The objection raised is that it is sued for a several cause of action and a joint and several cause of action. The objection, therefore, is to a misjoinder of parties, rather than a misjoinder of causes of action. Whether the demurrer be to the one or the other, the demurring defendant must show that he is prejudiced by the misjoinder.

The codefendant, Crumpler, might complain because he might be made to suffer in a general verdict for a negligent act for which it was not even claimed that he was responsible. The demurring defendant is, according to the statement, alleged to be responsible for each and every act complained of. Crumpler did not demur and the defendant company is not injured.

Ency. of Pl. and Prac., Vol. XIV, pp. 212-213. "It is well settled that the objection of multifariousness or misjoinder is a personal one and that only a defendant who is prejudiced thereby can be heard to complain of it. * * * Generally, moreover, a proper defendant cannot demur for the misjoinder of an improper one."

The case of *Hines v. Jarrett*, 26 S. C. 480, 2 S. E. 393, to which we have been referred, is not authority here. In that case there were separate injuries at different times. Here there was one injury at one time.

The judgment appealed from is affirmed.

8589

STATE v. ELLISON.

1. **CHARGE—SELF-DEFENSE.**—In view of the careful instruction by the Court in this case as to the crimes of murder and manslaughter and the degree of proof required in criminal cases, it was not error for the Judge to say to the jury at the close of his charge, their first duty was to enquire if the defendant had made out his plea of self-defense by the greater weight of the evidence.
2. **MURDER.**—A provocation of mere words will not reduce a killing from murder to manslaughter.
3. **CHARGE—CASTLE.**—Where a defendant strikes while in his store, an instruction that the law of the castle does not apply, but that of the premises may, is not error when this part of the charge is considered in connection with the entire charge.

Before PRINCE, J., Anderson, May term, 1912. Affirmed.

Indictment against John C. Ellison for murder. Defendant appeals.

Messrs. Bonham and Watkins, T. F. Watkins and J. P. Carey, for appellant.

Solicitor P. A. Bonham and Mr. A. H. Dean, contra.

June 28, 1913. The opinion of the Court was delivered by

MR. JUSTICE WATTS. The defendant was tried at the May term of Court of General Sessions for Anderson County, 1912, before Judge Prince, on an indictment which charged him with the murder of R. A. Hunt, and was convicted of manslaughter. A motion for a new trial was made and refused, and defendant was sentenced, and from this conviction and sentence he now appeals and assigns error on the part of trial Judge in four exceptions.

The first alleges it was error for the Judge to say: "Now Mr. Foreman and gentlemen of the jury: When you go into your room first determine whether or not the defendant in this case has established his plea of self-defence

1 by the greater weight of testimony.' The error is:

That the first duty of the jury was to determine whether the State had made out its case beyond reasonable doubt, whether the deceased had been killed by the defendant before the defendant was called upon to prove his plea of self-defence by the preponderance of the evidence."

We have examined the entire charge of the Circuit Judge and we are pleased to say that he exercised the greatest care in defining each grade of homicide, pointing out distinctly the characteristics of each grade, warning the jury, repeatedly and at intervals, of its being the duty of the State to prove the offense beyond a reasonable doubt, and also of their duty to acquit the defendant if the State failed to prove

defendant's guilt of either the crime of murder, or that of manslaughter, beyond a reasonable doubt in each instance, and the extract from the charge embodied in this ground of appeal is based upon sound law, especially in view of the wholesome definitions of the crime of murder and manslaughter contained in the general charge to the jury, wherein he was careful to point out what proof was required, and the jury could not have been misled, and this ground is overruled.

The second exception charges error on the part of the Judge in saying to the jury: "I meet you on the street, I insult you most grievously, by uttering about you, and in your presence, language calculated to arouse the
2 wrath of the ordinary man, and it does arouse your wrath, and in consequence of the aroused wrath, and not because of any preformed purpose, you strike me dead, the law says that it is manslaughter, no, the law says that is murder, where it is done by mere words. That is murder, because there is not sufficient legal provocation." This exception is overruled for the reason stated in overruling the first exception, and for the additional reason that it was in accord with the law, as laid down in *State v. Jacobs*, 38 S. C. 29, 4 S. E. 799; *State v. Levelle*, 34 S. C. 129, 13 S. E. 319; *State v. Davis*, 50 S. C. 424, 27 S. E. 905.

The third exception alleges error on the part of his Honor when charging on the proposition of what is necessary to make out the plea of self-defense in saying to them: "I will not undertake to define to you what is known as
3 the law of the castle, because there is no evidence in this case tending to show that the defendant was at the time of the fatal encounter in his dwelling house, or his yard, but the law of the premises may be applicable in this case, and I charge you that a man on his own premises is not bound to run." This exception is overruled, for the reason the Judge's charge, when read in full, will show no reversible error, and his reasoning is sustained by the prin-

ciple laid down in *State v. Summers*, 36 S. C. 480, 15 S. E. 369.

The fourth exception alleges error in charging the jury in reference to manslaughter in using this language: "The law never recognizes mere words as sufficient provocation to reduce killing to manslaughter. However insulting
2 those words, however calculated to arouse the wrath of the ordinary man, and however the jury may be convinced that those insulting words did arouse the wrath of him who did the slaying, the law says that no words ever amount to a sufficient provocation to reduce a killing to manslaughter." This exception is overruled for it was a correct proposition of law, when taken with his Honor's charge as a whole, and is sustained by the principle laid down in *State v. Davis*, *supra*, and this is not in conflict with the law as laid down in *State v. Beckman*, 24 S. C. 284; *State v. Cobb*, 65 S. C. 325, 43 S. E. 654; *State v. Rowell*, 75 S. C. 494, 56 S. E. 23; *State v. Ferguson*, 91 S. C. 235, 74 S. E. 502. The exceptions are overruled.

Judgment affirmed.

8590

REED v. REED.

1
APPEAL—DISCRETION—ALIMONY—SUIT MONEY.—In absence of showing of abuse of discretion in Circuit Judge allowing temporary alimony and council fees, appeal from such order will not be considered.

Before GAGE, J., Richland, December, 1912. Affirmed.

Action by Mable Reed against J. W. Reed. Defendant appeals.

Mr. Robert Moorman, for appellant, cites: 60 S. C. 448; 4 DeS. Eq. 33; 10 Rich. Eq. 176; 91 S. C. 245; 1 McC. Eq. 117.

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Messrs. Pringle T. Youmans and J. Hugh Cooper,
contra.

June 28, 1913. The opinion of the Court was delivered by

MR. JUSTICE FRASER. This is an action for alimony. His Honor, Judge Gage, granted temporary alimony and counsel fees. From this order the defendant appealed. There are two exceptions as follows:

1. "That upon the showing and counter showing made before him on December 11th, 1912, his Honor, Judge Gage, erred in holding that plaintiff had made out a *prima facie* case for temporary alimony and counsel fees.

2. "It is respectfully submitted that his Honor, Judge Gage, abused the discretion imposed in him in granting said order for temporary alimony and counsel fees."

These exceptions admit that the matter is in the discretion of the Circuit Judge and no abuse of discretion has been shown. See the recent case of *Norman v. Norman*, 94 S. C. 204; 77 S. E. Rep. 865, and cases there cited.

It is therefore ordered, that the order appealed from is affirmed.

8591

STATE EX REL. CULP v. CITY COUNCIL OF UNION.

ALDERMAN—REGISTRATION—CITIES AND TOWNS.—A resident of a city ward, who is a qualified elector for county elections, but who has not registered in the general municipal registration for the election at which he was elected alderman, is not qualified to hold the office in a city chartered under the general law for cities containing over 5,000 inhabitants.

Before SEASE, J., Union, December, 1912. Affirmed.

Petition of F. B. Culp *et al.* for writ of mandamus against the city council of the city of Union. Defendants appeal.

Mr. J. Ashby Sawyer, for appellants, cites: *Municipal registration is not necessary to hold the office of alderman*: 55 S. C. 90; 28 Cyc. 412; 23 Ency. 330; 61 S. C. 67; 62 S. C. 67. *Kirby, holding the office before the election, is still the alderman from that ward, if there is a vacancy, by virtue of holding till his successor qualifies*: 29 Cyc. 1399, 1400, 1402; 23 Ency. 412, 415; 14 L. R. A. 858. *Court cannot require city council to hold election after election declared*: 73 S. C. 398; 52 S. C. 60; 3 L. R. A. 316; 70 S. C. 313; 30 S. C. 579; 19 Ency. 866; 22 S. C. 582; 26 Cyc. 162; 30 S. C. 579; 3 L. R. A. 777; 33 S. C. 278; 68 S. C. 552; 27 At. 449.

Messrs. Young & Beatty, contra, cite: *Qualification to hold municipal office*: 23 Ency. 530, 531; 9 Pa. St. 518; 16 Nev. 59; 67 Mo. 337; 98 N. C. 348; 96 N. C. 514, 49, 127; 97 N. C. 227; 55 S. C. 90; 10 Ency. 860; 23 Ency. 338-9. *Vacancy as applied to an office*: 29 Ency. 562-3; 77 Va. 300; 15 R. I. 621; 57 Cola. 620; 25 Fla. 426; 44 Ia. 15; 71 Kan. 327; 54 N. H. 509; 54 Tex. 482; 76 S. C. 574; 75 S. C. 574; 55 S. C. 90. *Vacancy is created by expiration of regular term*: 151 N. Y. 497; 21 So. 665; 57 Cola. 620; 25 Fla. 192; 54 Tex. 482; 32 Fla. 138; 77 Va. 265; 23 Ency. 417; 14 S. C. 367. *Mandamus may be issued*: 30 S. C. 582; 10 Ency. 805, 863; 19 Ency. 866, 867; 20 Ency. 793; 2 N. & McC. 169; 4 S. C. 128.

June 28, 1913. The opinion of the Court was delivered by

MR. JUSTICE WATTS. This is a petition filed by the relators, praying for a writ of mandamus, requiring the respondents (appellants here) to order and hold an election

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in ward one, of the city of Union, for the election of an alderman from said ward. The petition exhibited verified and accompanied by affidavits sets forth: That at an election on June 4th, 1912, in the city of Union, J. E. Kirby received a majority of votes cast for alderman for ward one, and was declared elected to that office; that the said Kirby was not, at the time of said election, "a qualified elector, nor was he a registered voter in the said election," and was not, therefore, qualified to hold public office under the Constitution and laws of this State; that they are informed and believe that said Kirby is undertaking to act as alderman for said ward; that they called upon the mayor and aldermen from the other wards, and through petition demanded that an election be ordered; that they have the right to be represented in said council by some one who is a duly qualified elector; and that it is the official duty of the city council to order elections to fill vacancies and that the respondents are the officers of the city. Upon the petition and affidavits, Judge Sease issued a rule requiring the respondents to show cause before him why the writ prayed for should not issue. Return was made as required, and after argument, Judge Sease, on December 7th, 1912, made an order directing the writ of mandamus to issue, as prayed for, and the formal writ was issued. Appeal was made from the order of Judge Sease.

The undisputed facts in the case show that at the time of the election for mayor and alderman for the city of Union in 1912, J. E. Kirby had been, for at least four years prior thereto, a *bona fide* resident of the said ward, and had paid all taxes due and assessed against him for the preceding fiscal year, and held a registration certificate, duly issued by the board of registration for the county of Union, as a registered elector of ward one of Union, S. C. That he had been elected and served as alderman from that ward in 1908 and 1910, and had been duly nominated by

his party in 1912 and duly elected, but that he failed to register for the municipal election, 1912.

The city of Union is divided into wards, and is operated under charter for cities of over five thousand population and charter is issued by Secretary of the State. The original act providing for the incorporation and government of cities of more than five thousand inhabitants is found in vol. 23, Statutes at Large, as Act 377, page 648, passed in 1901. Section 2 thereof was incorporated in Code of 1902, as section 1965, vol. 1, and as part of the Code of 1912, vol. 1, section 2924, and reads as follows: "Said city shall be governed by a mayor and alderman, or in case of municipalities, being divided into wards, one alderman from each ward, who shall be, and be known as the city council of said city. Said mayor and alderman shall be qualified electors of this State and of the county in which said city is situated, and they shall have resided in the corporate city at least six months immediately preceding the day of election. If the city be divided into wards, the alderman from each ward shall be a qualified elector thereof, and shall be elected by the qualified electors thereof."

Section 221, Code of Laws 1912, vol. 1, provides for the registration for municipal elections in substance, that ninety days before holding the regular election, etc., a supervisor of registration shall be appointed, "whose duty it shall be to register all qualified electors within the limit of the incorporated city or town. The names of the qualified electors of such municipalities shall be entered in a book of registration, etc.," "provided that twenty days prior to any special election to be held as aforesaid, the books of registration shall be opened for the registration of the names of the qualified electors therein, and shall be open for a period of ten days. Immediately preceding any municipal election to be held in any incorporated city or town in this State, the supervisor or supervisors of registration (as the case

may be) shall prepare for the use of managers of election of each polling precinct in such city or town, a registration book or books for each polling precinct in such city or town, containing the names of all electors entitled to vote in such polling precinct at said election."

This clearly shows that, in order to vote in a municipal election a municipal registration is necessary, and it is a necessary qualification, in order to hold the office of alderman, that the party elected is not only a qualified elector and entitled to vote in the State and county elections, but he must be a resident of the ward from which he is elected and duly qualified to vote in the municipal election that elects him. In this election, Mr. Kirby was not a qualified elector, and could not be elected in it to the office of alderman, and is not entitled to that office, and that office is vacant, and his Honor, Judge Sease, committed no error in so holding and in issuing the writ of mandamus. All of the exceptions are overruled, and judgment appealed from affirmed, and case remanded with instructions that the city council of Union order an election to fill the vacancy within thirty days after remittitur is sent down to Circuit Court.

8592

KNIGHT v. KNIGHT.

1. **NONSUIT—VERDICT.**—There being sufficient evidence to carry the case to the jury and more than one inference deducible from the evidence, nonsuit and motion to direct a verdict was properly refused.
2. **EVIDENCE — REAL PROPERTY — CROSS-EXAMINATION.** — **THE DECLARATIONS** of one deceased as to his title to a tract of land is not admissible to show title in him when not made in the presence of one claiming title from him. That the witness was cross-examined as to the declarations is no waiver of appellant's objections.

Before MEMMINGER, J., Laurens, Fall term, 1912.
Reversed.

Action by William B. Knight against John L. Knight.
Defendant appeals.

Messrs. Richey & Richey, for appellant.

Messrs. Simpson, Cooper & Babb, contra.

June 30, 1913. The opinion of the Court was delivered by

MR. JUSTICE WATTS. This was an action for the recovery of real estate by respondent against the appellant, tried before his Honor, Judge Memminger, and a jury, at the Fall term of Court for Laurens county, 1912, and resulted in a verdict in favor of plaintiff-respondent here. At the close of plaintiff's testimony, the defendant made a motion for nonsuit, which was refused. At the close of all the testimony in the case, defendant moved that a verdict be directed for defendant, which was refused, and after verdict a motion for new trial was made and refused. After entry of judgment, appellant appeals and asks reversal on eight exceptions, alleging error on the part of his Honor in admitting over objection, incompetent testimony on the part of respondent in not granting a nonsuit, or directing a verdict for the appellant, and challenges the correctness of his Honor's law, as laid down to the jury, as to whether he should have granted a nonsuit or directed a verdict as asked for in favor of the appellant.

It is sufficient to say that under the testimony admitted by the trial Judge there was sufficient testimony to carry the case to the jury, and in passing on refusal of Circuit

Judge to grant a nonsuit this Court may consider all

1 the testimony in the case, and there being more than one inference deducible from the evidence in the case it would have been error to direct a verdict. *Dupuy v. Williams*, 91 S. C. 185, 74 S. E. 381; *Davis v. Reynolds*, 91 S. C. 440, 74 S. E. 827.

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The appellant's second exception is: "That his Honor erred in admitting in evidence over the objection of the defendant so much of the testimony of plaintiff's witness,

Mrs. Eddie Ballentine, as related to the declarations
2 of B. E. Knight, that the land in dispute was his,
that he let the rent go for the taxes; that the land was all he had, and he intended for his two boys to have it. The said B. E. Knight being then dead, the testimony was incompetent as hearsay and as self-serving declaration of B. E. Knight, and declarations in favor of his own title, and should not have been admitted in support of his own title to said land."

The third exception is: "That his Honor erred in admitting in evidence, over the objection of defendant, so much of the testimony of plaintiff's witness, Mrs. Laura Knight, as related to declarations of B. E. Knight, that the land was his, and he intended to do as he pleased with it, that he offered the land for sale once to Mrs. Alewine, that B. E. Knight and his wife showed Mrs. Alewine over the place, and said that if he sold to Mrs. Alewine he would move John L. Knight down on his place, near his home. The said B. E. Knight being then dead, the said testimony was incompetent hearsay and self-serving declaration of B. E. Knight, and declarations in favor of his own title, and should not have been admitted in support of his own title to said land."

We are of the opinion that these exceptions should be sustained, so much of the testimony of Mrs. Lou Knight, which detailed the conversation of B. E. Knight and John L. Knight, was competent, but the declarations of B. E. Knight as to the ownership of the land in dispute made in the absence of John L. Knight, was clearly incompetent, and as to the testimony of Mrs. Ballentine, there is no claim that John L. Knight was present at all, at any time, the claim of ownership or declarations in reference thereto, was made by B. E. Knight. This testimony was admitted over

the objection of appellant's counsel. It is true he cross-examined the witness, but that was subject to his objection to the admissibility of her testimony, which objections the Court overruled, and admitting it, and allowing these declarations to go to the jury was prejudicial to the appellant. In *Wingo v. Caldwell*, 36 S. C. 598, 15 S. E. 382, the Court says: "There can be no doubt of the correctness of appellant's claim, that our decisions fully sustain the doctrine that declarations in favor of one's own title are not admissible in support of such title."

In *Ellen v. Ellen*, 18 S. C. 494, this Court held that the Circuit Judge was in error in "admitting the declarations of David Ellen in support of his title as independent testimony in reply to his declarations in disparagement thereof introduced by the defendants, if these declarations had been part of the same conversation, or had been explanatory of some special act, then they might have been admitted as part of the *res gestae*, but the declarations of a party interested can never, *per se*, be admitted as evidence of his right."

This error on the part of Circuit Judge will necessitate a new trial, and it is unnecessary to consider the other exceptions undisposed of.

Judgment reversed and a new trial granted.

8593

WATTS v. HERMITAGE COTTON MILLS.

1. MASTER AND SERVANT—SAFE PLACE.—Where the master places his servant under the control of another, that other is the representative of the master, and if he puts the servant to work at an unsafe place or directs him to do the work in a dangerous way, the master is liable to the servant for injury resulting therefrom.
2. IBID.—CHARGE—FELLOW SERVANTS.—The master practically received the benefit of his request covering the principle of the nonliability

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of the master when the foreman and men working with him are fellow servants.

3. **FELLOW SERVANTS—BURDEN OF PROOF.**—Where the master sets up the defense of injury by fellow servants in suit by servant against him for damages for injury, he must prove it by the greater weight of the evidence.

Before GAGE, J., Kershaw, November, 1912. Affirmed.

Action by L. W. Watts against Hermitage Cotton Mill. Defendant appeals on the following exceptions:

1. "That his Honor, the presiding Judge, erred in refusing to grant the motion for nonsuit on the ground 'that the alleged injuries to plaintiff were not due to any act of negligence of defendant as a proximate cause thereof.'

2. "That his Honor, the presiding Judge, erred in not granting the motion for nonsuit upon the second ground presented by the defendant-appellant, 'that if the plaintiff was injured as alleged in the complaint it was not caused by any act of the defendant.'

3. "That his Honor, the presiding Judge, erred in refusing to grant the motion for nonsuit made by the defendant-appellant upon the ground 'that if the plaintiff was injured as alleged in the complaint it was not due to any act of negligence of the defendant.'

4. "That his Honor, the presiding Judge, erred in refusing the motion of nonsuit made by the defendant-appellant upon the ground 'that if the plaintiff received the injuries complained of, they were due to the act, or acts, of a fellow servant, for which the defendant is not liable, there being no allegation in the complaint that the defendant had failed to exercise due care in the selection thereof.'

5. "That his Honor, the presiding Judge, erred in refusing the said motion for nonsuit made by the defendant-appellant upon the ground 'that if the plaintiff was injured as alleged, such injuries were due to the natural and ordinary risks of such employment.'

6. "That his Honor, the presiding Judge, erred in refusing the motion of defendant-appellant for nonsuit made upon the ground 'that if the plaintiff was injured as alleged in the complaint, it was due to his assumption of the risk which resulted in such injury.'

7. "That his Honor, the presiding Judge, erred in refusing the motion of the defendant-appellant for nonsuit made upon the ground 'that if the plaintiff was injured as alleged in the complaint, it was due to the plaintiff's own carelessness and negligence in placing and handling said box.'

8. "That his Honor, the presiding Judge, erred in refusing the motion of the defendant-appellant for a new trial upon the ground 'that under the charge of his Honor, Geo. W. Gage, the jury were instructed that in order to find a verdict for the plaintiff they must find by the preponderance of the testimony that the floor in the cotton mill of the defendant company, at the place described in the complaint, was rough, unlevel and uneven, as alleged in the said complaint, whereas, as a matter of fact, the clear and overwhelming preponderance of the testimony shows that the said floor was smooth, level and even.'

9. "That his Honor, the presiding Judge, erred in refusing the motion of the defendant-appellant for a new trial upon the ground 'that the clear and overwhelming preponderance of the testimony shows that the injury to the plaintiff was caused by the act of a fellow servant or fellow servants, or was caused by the negligence of the plaintiff himself, as a proximate cause thereof, and that in either event the plaintiff is not entitled to recover.'

10. "That his Honor, the presiding Judge, erred in refusing the motion of the defendant-appellant for a new trial upon the ground 'that the undisputed testimony and the testimony of the plaintiff himself, shows conclusively that the dangers incident to the employment in which the plaintiff was engaged at the time of the alleged injury were open, patent, such as were incident to the said employment, and

were fully known to the plaintiff when he undertook to perform the labor, and there is no scintilla of testimony to the contrary.'

11. "That his Honor, the presiding Judge, erred in refusing the motion of the defendant-appellant for a new trial upon the ground 'that there is no scintilla of testimony, showing or tending to show, that any act of the defendant company was a proximate cause of the injury, but on the contrary, the undisputed testimony shows that the injury alleged by the plaintiff, was not, and could not in any view, be considered such as could or did naturally or reasonably follow from any act of the defendant.'

12. "That his Honor, the presiding Judge, erred in refusing the motion of the defendant-appellant for a new trial upon the ground 'that the complaint alleges as the sole act of negligence an order directing plaintiff and others to place a box of a certain size, weight and shape on an unlevel, rough and uneven floor, and that the danger, if any, incident to the carrying out of said order and to the said labor, was open and patent, and from the very nature of the case was known to any man of reason, and was known to the plaintiff himself when he undertook to perform the labor, and there is no scintilla of testimony to the contrary. And the undisputed testimony shows that under the circumstances alleged in the complaint the plaintiff undertook to perform the labor, and that he and his fellow servants did perform the same in such manner as they saw fit without instruction or direction from anyone, well knowing all the circumstances, and there is no scintilla of testimony to the contrary.'

13. "That his Honor, the presiding Judge, erred in refusing the motion of the defendant-appellant for a new trial upon the ground 'that there is no scintilla of testimony showing or tending to show that the person who gave the order, alleged in the complaint as an act of negligence, was a representative of the defendant or in the employment of

the defendant company; and even if he were a servant of the defendant, the undisputed testimony shows that he was a fellow servant of the plaintiff in performing the work then in hand and then being done, and there is no scintilla of testimony showing or tending to show the contrary, and plaintiff cannot recover.'

14. "That his Honor, the presiding Judge, erred in refusing to charge the jury upon the question as to whether the foreman, H. F. Andrews, and Noland were fellow servants with the plaintiff in performing the work about which plaintiff was engaged at the time of his injury, as his Honor was requested to do by the counsel for the defendant-appellant at the close of his charge to the jury.

15. "That his Honor, the presiding Judge, erred in refusing to act upon the request of the counsel for the defendant-appellant and to charge the jury in regard to the contention of the defendant-appellant that the foreman, Andrews, as well as Noland and Tom Ballard were fellow servants with the plaintiff in performing the work in which the plaintiff was injured, and 'if they were fellow servants the jury are to find, it made no difference whether the foreman ordered him (the plaintiff) or not, the mill is not to be liable under the circumstances.'

16. "That his Honor, the presiding Judge, erred in charging the plaintiff's first request to charge: 'I charge you that if you find from the evidence, that the defendant directed the plaintiff to place the box of machinery upon its end and that this was not a reasonably safe way to place the box, and that as a result of placing the box in this manner it fell and injured the plaintiff, and you further find that the plaintiff himself was not guilty of any negligence which contributed to the injury as a proximate cause thereof without which the injury would not have occurred, then your verdict should be for the plaintiff;,' in view of the fact that his Honor, the presiding Judge, refused to charge in response to defendant's request as to whether

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the foreman, Andrews, as well as Noland and Tom Ballard, were fellow servants with the plaintiff in performing the work about which he was engaged when injured, the defendant respectfully submitting that while the above may be a correct statement of law in general terms, under the facts of this case the defendant was entitled to have the jury instructed upon the question as to whether the foreman, Andrews, as well as Noland and Tom Ballard, were fellow servants with the plaintiff in this particular work, and the refusal so to charge took from the jury the question as to whether an order by the said foreman was or not itself a direction by the defendant company and virtually charged them, contrary to the contention of the defendant, that the foreman and Noland were not fellow servants with the plaintiff.

17. "That his Honor, the presiding Judge, erred in charging plaintiff's third request: 'I charge you that if you should find that the plaintiff, Mr. Watts, was injured as a direct result of the order given by his superior officer, and that in giving said order such superior officer was guilty of negligence, and that Mr. Watts in performing said order was not guilty of any negligence which contributed to the injury as a proximate cause thereof without which the injury would not have happened, the plaintiff, Mr. Watts, would be entitled to recover for injuries which he has sustained;' the defendant-appellant respectfully submitting that while this may be a correct statement of the abstract principle of law, under the refusal of his Honor, the presiding Judge, at the request of defendant's counsel to charge upon the question as to whether the foreman as well as Noland and Tom Ballard were fellow servants with the plaintiff in performing the work at which he was injured, the above quoted charge took away from the consideration of the jury the question as to whether the foreman was a superior officer or fellow servant of the plaintiff, Mr. Watts, and in effect charged the jury contrary to the contention of the defendant-appel-

lant that the foreman was the superior officer of the plaintiff, and in charging the same under the circumstances it became a charge upon the facts, which were for the consideration of the jury.

18. "That his Honor, the presiding Judge, erred in charging plaintiff's fifth request to charge as follows: 'I charge you that when the law speaks of an act as contributing to an injury it means as a proximate cause thereof without which the injury could not have happened. Consequently, in this case I charge you that if you find from the evidence that Mr. Watts, the plaintiff, was injured as a direct result of the defendant's negligence in any or all of the particulars charged in the complaint, and you further find that the plaintiff was not guilty of such negligence as contributed to the injury as a proximate cause thereof, without which the injury would not have happened, then the plaintiff is entitled to recover against the defendant for such injuries as he has sustained,' the said charge completely ignoring the doctrine of fellow servant and completely ignoring the question of the assumption of risk by the plaintiff, and it is respectfully submitted that the charge should have contained as a qualification 'unless the plaintiff assumed the risk of the employment and unless the injury was the result of the act of some fellow servant engaged with the plaintiff upon the work.'

19. "It is respectfully submitted that his Honor, the presiding Judge, erred in charging the jury as follows: 'The mill contends it ought not to pay for three reasons independent of its denial of any wrong on its part. It says Watts, when he went there, assumed the risks incident to that business. * * * The next defense is that Watts was careless. * * * The third defense is, if I catch the argument of counsel, is that Watts was a fellow servant with Tom Ballard—you know who Tom Ballard is, the black man. * * * Now, if you sustain those defenses, or any of them, that ends Watts' case. But the mill has set up those

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defenses, and the mill must prove them by the preponderance of the testimony; that is, the mill must satisfy you by the greater weight of the evidence that those three defenses set up are so. If it does so, the case ends there, and you would say, "We find for the defendant;" but if the mill failed to so satisfy you, you take up the case against the mill.' The error being, that by the said charge, his Honor, the presiding Judge, instructed the jury that the defendant-appellant must prove the defense of assumption of risk, contributory negligence and fellow servant by the preponderance of the testimony, whereas it is respectfully submitted that the defendant is not required to prove the defense of fellow servant by the preponderance of the testimony, but that it is incumbent upon the plaintiff himself in proving the case to prove by the preponderance of the testimony that the act was the act of the defendant himself and not the act of a fellow servant or of any other person."

Messrs. M. L. Smith, W. M. Shannon and L. T. Mills, for appellant, cite: The appellant did no act of negligence that was the proximate cause of the injury: 66 S. C. 302; 70 S. C. 470; 72 S. C. 346, 398; 91 S. C. 128; 71 S. C. 53; 93 S. C. 193; 55 S. C. 490. Who are fellow servants? 80 S. C. 236; 71 S. C. 56; 76 S. C. 549; 87 S. C. 449; 81 S. C. 46; 71 S. C. 57. Plaintiff assumed the risk: 80 S. C. 328; 61 S. C. 468; 81 S. C. 525; 73 S. C. 507; 21 S. C. 547; 87 S. C. 213; 72 S. C. 237; 89 S. C. 387; 93 S. C. 193; 73 S. C. 507; 85 S. C. 363; 77 S. C. 328; 55 S. C. 483; 81 S. C. 374. He was guilty of contributory negligence: 80 S. C. 239; 72 S. C. 237; 89 S. C. 387; 77 S. C. 328; 58 S. C. 491; 90 S. C. 42; 86 S. C. 69. Difference between defense of fellow servant and assumption of risks: 51 S. C. 95.

Messrs. Rembert & Monteith, contra, cite: The Judge is not required to pass on a request not submitted in writing:

68 S. C. 428; 76 S. C. 207; 78 S. C. 401; 76 S. C. 1; 92 S. C. 175. *Court only required to charge requests applicable to case:* 84 S. C. 202; 85 S. C. 26, 234. *Burden is on defendant to prove defense of injury by fellow servant:* 26 Cyc. 1408; 66 S. C. 482; 82 S. C. 224; 89 S. C. 387. *Andrews represented the master:* 80 S. C. 232; 76 S. C. 549; 89 S. C. 387.

June 30, 1913. The opinion of the Court was delivered by

MR. CHIEF JUSTICE GARY. This is an action for damages, alleged to have been sustained by the plaintiff through the negligence of the defendant.

The defendant denied the allegations of negligence, and set up the defense of contributory negligence and assumption of risk on the part of the plaintiff, and that the injury was the result of a risk, which was incident to his said employment, by which, it seems, was meant the negligence of a fellow servant.

At the close of the plaintiff's testimony, the defendant made a motion for a nonsuit, which was refused.

The jury rendered a verdict in favor of the plaintiff for one thousand dollars.

The defendant made a motion for a new trial, which was also refused.

The defendant then appealed upon numerous exceptions, which will be reported.

The first question that will be considered, is raised by the thirteenth exception.

The plaintiff testified as follows: "The date alleged in this complaint, about the 5th of December, 1910, where were you working? At the Hermitage Cotton Mills. What were you employed to do there? I was employed

1 to help, at the time, Mr. Andrews, putting up frames.

The morning of the injury, what work were you actually engaged in that morning? Putting up skeleton

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frames; I was helping them move boxes. Who did you say was there; whom did you work under? Mr. Andrews; working under Mr. Andrews at the time. Was Mr. Andrews present? Yes, sir. Now, Mr. Watts, were you injured there? Yes, sir. I wish you would tell the Court and jury how you received any injury there. Well, we were moving those boxes. Mr. Andrews had us to move the boxes from the back end. The first box had to go around the upper end of the frame and come between the wall and frame. As I passed Mr. Andrews I said, 'Where will we put this box?' He said, 'Set it up over there.' Pointed out the place to put it? Yes, sir. Who was bringing it? Us three—Nolan, Ballard and myself. Where was Mr. Andrews? Standing in the alley, opposite between them and the other frames. You went up and asked him where to put the box? Yes, sir. And he told you where to put it? Yes, sir. Did you put it where he told you? Yes, sir. And you were instructed to set it up on the end? Instructed to set it up on the end. Did you place it where he told you? Placed it where he told me. Now, coming down to the actual injury; how did that occur? After we placed the box up there, I steadied it; I was on the other side of it, and the other two turned off in about the same time I did, I reckon, I think about that time; but we steadied it good before we let it loose where it was to stand. I just turned around. As I turned around I got far enough to keep the box from catching me anywhere except right here and it knocked me down. Could this box have been laid flat down on the ground? Yes, sir, could have been."

The Court: "What you mean is on the side and not on its end? Mr. Monteith: Yes, sir.

"If it had been laid that way, would have been flat down on the floor? Yes, sir. Could it have turned over that way? No, sir. Were you or not instructed to set it up on its end? I was. And you did so? Did so; yes, sir. Was this Mr. Andrews the superintendent of the mill? He was

foreman of them frames; he was not superintendent of the mill. Who was superintendent of the mill? Mr. West was superintendent of the mill. Who told you to work with this man, Andrews? Mr. West. Told you Mr. Andrews was there in charge of putting up the frame? Yes, sir; he put me with Mr. Andrews that morning. And told you to do as Mr. Andrews told you to do? Yes, sir."

H. F. Andrews, a witness for the defendant, testified as follows: "Where were you at work? The Hermitage Mills. What was your business there? I came here to put up fly frames. Did you have anyone to assist you at that work? Three of the mill men. Was Mr. Watts one of those employed with you at the time? Yes, sir. Who furnished you the hands to do this work? The superintendent, Mr. West. Was Mr. West there while you were doing this work any time? He was in and out of the room. You did that; you directed what to do and how to do it? Yes, sir."

Redirect examination.

Mr. Mills: "Mr. Andrews, you were asked whether there was a reason for setting the boxes on end, and you said there was. Why? You set them on ends, square them around to get them out of the way to go by with the others and give more room. Are you accustomed to receiving boxes of that size and setting them up? Yes, sir. Was that the usual box? Yes, sir; with that stuff in it. It is customary for you to have those boxes set up that way, on end? Yes, sir. How many years have you been doing that? Thirteen years. You have done that in one mill, or in many mills? Several mills. Have you been doing that since that time? Yes, sir. It is not a common thing to set those boxes up that way? Yes, sir. And to receive them as you have stated? Yes, sir."

Mr. Blakeney: "You say for the reason to move them out; that's the reason that you set them up on end; more liable to fall that way than if laid down to be opened?

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Yes, more apt to fall. If you had laid it down as you did when you took it off of Mr. Watts, it could not have fallen on anybody? No, sir. If you laid it down flat it would be a safer way so far as falling? Yes, sir. There was plenty of room to lay it flat? Yes, sir. That is the safest way, as far as falling on anybody? Yes, sir."

P. L. West, the superintendent of the mill, thus testified as a witness for the defendant: "Did you hire Mr. Watts? Yes, sir. What had you hired him to do? Before that, I had him to do something else. I turned him over to Mr. Andrews and Mr. Andrews gave him instructions. I just told Mr. Andrews to take those men; he could have them to assist him."

It will be thus seen that P. L. West, the superintendent of the mill, placed the plaintiff under the direction and control of H. F. Andrews, with instructions to do whatever Andrews told him to do, and that he was injured while carrying out the orders of Andrews, which rendered the situation more dangerous than if the box had been placed on its flat surface.

It was the duty of the defendant to furnish the plaintiff with a safe place to work, and also a safe method of doing the work. Under the circumstances, Andrews was the representative of the master in ordering the plaintiff to deposit the box on end; and if, in giving such directions, he was guilty of negligence, which resulted in the plaintiff's injury, the defendant would be liable, unless the plaintiff was guilty of contributory negligence, or unless the injury was the result of a risk which he assumed.

McBrayer v. Chemical Co., 89 S. C. 387. In that case the Court said: "This case is distinguished from *Martin v. Royster Guano Co.*, 72 S. C. 237, 51 S. E. 680, because in that case there was no testimony that the foreman ordered Martin to work at the particular place at which he was injured, or that he ordered him to remain there and work,

after he became apprehensive of danger." This exception is overruled.

We proceed to the consideration of the fourteenth exception.

The record shows that the following took place at the close of the charge:

Mr. Smith: "Our contention is, all of these parties were fellow servants with the foreman, as well as Noland and Tom Ballard, and if they were fellow servants, the jury are to find it made no difference whether the fore-
2 man ordered him or not, the mill is not to be liable under the circumstances.

The Court: "I made my charge in response to your argument.

Mr. Smith: "We took that position this morning."

His Honor, the presiding Judge, had already charged the jury, as follows:

"If Andrews stood in the place of the master, that is, of the mill, and directed that box to be put there, and Tom put it there because Andrews, representing the mill, told him to put it there; if you conclude that is so, and that was a careless thing, a negligent thing, that a reasonably careful man would not have done that, would not have ordered a box of that character to be put at that place; if you come to that conclusion, then you conclude that the mill was negligent, and that is a matter peculiarly for you."

He also charged as follows: "The third defense is, if I catch the argument of counsel, is that Watts was a fellow servant with Tom Ballard—you know who Tom is, the black man. I do not think it will be disputed, I do not think there is any dispute about Watts and Tom being fellow servants; that is to say, they were together handling the box. If Watts came to his disaster by reason of negligence on the part of Tom, under the law the mill would not be liable, because they would be fellow servants, and when Watts went to work with Tom he assumed that risk, that

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Tom would be as careful as he would be and he would be as careful as Tom."

So that even conceding there was error, it was not prejudicial, as the defendant practically received the benefit of the request.

What has already been said disposes of the fifteenth, sixteenth, seventeenth and eighteenth exceptions.

The nineteenth exception cannot be sustained, for

3 the reason that the defendant had set up as a defense that the injury was caused by the negligence of a fellow servant.

In such cases the rule is thus stated in *Roberts v. Chemical Co.*, 84 S. C. 283, 66 S. E. 298: "Evidence tending to prove that the plaintiff's injury was caused solely by his own negligence, or by the negligence of a fellow servant, would have been admissible under the general denial. It was, therefore, unnecessary for defendants to set up, as an affirmative defense, that the plaintiff's injury was caused by the negligence of a fellow servant. This fault in their pleadings very naturally led the Circuit Judge into the inadvertent error of charging the jury, that the burden was upon the defendants to prove the defense, for it was set up as an affirmative defense between the other two affirmative defenses, the burden of proof of which was upon defendants. Parties ought not to be heard to complain when their own faulty pleadings misleads the Circuit Judge."

Furthermore, it was not incumbent on the plaintiff to prove that he was not injured by the negligence of a fellow servant; and the defendant could not get the benefit of such fact unless it made proof thereof, which had to be established by the preponderance of the testimony in order to produce conviction on the minds of the jurors.

All the other exceptions relate to the sufficiency of the facts to sustain the plaintiff's cause of action, or to sustain the defense of assumption of risk, contributory negligence,

or negligence of a fellow servant; and as shown by the foregoing testimony and for the reasons hereinbefore stated, cannot be sustained.

Judgment affirmed.

MR. JUSTICE FRASER *concurs in the result.*

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McLAIN, ADMINISTRATOR, v. WOODSIDE.

1. EVIDENCE—TRANSACTIONS WITH DECEDENT.—It is competent for a witness to testify that he collected rent for deceased and paid it to him in an action by administrator of such deceased in aid of assets involving title to the land.
2. IBID.—RELATIONSHIP.—One not related to the family may testify as to his familiarity with the family and its connections and the reputation in the family as to its relations.
3. CHARGE—ADVERSE POSSESSION.—An instruction that defendant must have held the land for full ten years before the commencement of this action, May 10, is not a charge on the facts.
4. ISSUES.—In a suit to sell land in aid of assets the Court may submit issues of title to the jury.

Before GAGE, J., Kershaw, November term, 1912.
Affirmed.

Action by Geo. W. McLain, admr. of Henry Davis, against Edward Allen *et al.*, of whom Rose Woodside appeals on the following exceptions:

First. "For error in his Honor in allowing the witness, George McLain, to testify as follows, over the objection of this defendant: 'Q. Did you ever receive rent before Henry Davis from the house from anybody? A. From Mr. Moore. Q. Who was Mr. Moore? A. Real estate agent. Q. Where is he now? A. In New York, I am told. He collected rent for Henry Davis, bring it to me

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and I would give him receipt for old man Henry. Old man Henry authorized me to receive \$1.80 for him and to keep it for him, and when he came to the shop I would give it him. The Court: I think it competent for the witness to say he collected rent from the property and turned it over to Henry Davis; whereas, it is respectfully submitted that the Court should have held the said testimony incompetent, and merely hearsay, and should have excluded the same.

Second. "For error in admitting the declarations of the witness, Mary Carter, as to pedigree of Henry Davis, Eliza Villepigue, and Allen, over the objections of this defendant, she being a stranger and having no relationship to the said Henry Davis, Eliza Villepigue, or Allen, the Court holding as follows: 'You can prove it by anybody who knows; if a stranger knows as well as a relative, can prove it by stranger;' whereas, the Court should have held, it is respectfully submitted, that the said testimony was incompetent and inadmissible.

Third. "For error in not allowing the witness, Rose Woodside, to state in full her conversation with Henry Davis, after respondent's attorneys had brought out part of said conversation in reference to permission granted her by Henry Davis to do certain things in reference to said lot; and for error in refusing to allow appellant's attorney to examine said witness in reference thereto, as follows: 'Mr. deLoach: Now he has brought out part of the conversation with Henry. Mr. Wittkowsky: I have brought out nothing. Mr. deLoach: What did Henry say? Mr. Wittkowsky: We object, under section 400. The Court: What part did he bring out? Mr. deLoach: In regard to his permission. The Court: Overruled.'

Fourth. "For error in charging the jury as follows: 'Now; it is important to fix the date. This action was begun May, 1910, that is the reckoning point, May, 1910. Rose must have had that land for ten full years before that date, that is to say, she must have had it, been on it, in May,

1900, and held it from May, 1900, to May, 1910. Not only held it, but held it adversely against the owner; whereas, it is respectfully submitted, his Honor, the Circuit Judge, should have left it to the jury to fix the point from which to reckon the ten years' adverse holding, and should not have limited the adverse holding from May, 1900, to May, 1910.

Fifth. "For error in charging the jury that May, 1910, was the reckoning point in fixing the point from which to reckon the adverse holding, same being a charge upon the facts. For error in submitting to the jury the issues herein in the form of three questions as set forth in his charge, as follows: 'The first is: Was Henry Davis the owner of the premises? The second: Is the title of the premises now in Allen? Third: Is the title in the premises in Rose Woodside by adverse possession? And you answer these questions "yes" or "no," as you determine the facts, and sign your name as foreman.' Whereas, it is respectfully submitted that his Honor, the presiding Judge, should not have submitted the issues in this form, and he committed error in not charging the jury the facts to be determined by them should be under the rule that the plaintiff is required to make out his case by the greater weight of the evidence."

Mr. W. B. deLoach, for appellant.

Messrs. Kirkland & Kirkland and *L. A. Wittkowsky*, for Edward Allen, respondent.

July 2, 1913. The opinion of the Court was delivered by

MR. JUSTICE WATTS. This was an action by the plaintiff against the defendants for the sale of real estate in the aid of personalty to pay debts, etc., and the appellant, Rose Woodside, was made a party to that suit, and made answer, denying the allegations of the complaint and set up adverse

possession in her of the land is dispute. The case came for trial at the November term of the Court for Kershaw county, before Judge Gage, in November, 1912, that upon the trial his Honor submitted to the jury certain issues, and the finding by the jury was against the contention of the appellant, and after entry of judgment, she appealed and asks reversal on five exceptions, which should be set out in the report of the case.

The first exception alleges error in the admission of certain testimony of the witness, George McLain. By reference to what took place, objection was made to only

1 two questions, to wit: "Did you ever receive rent before Henry Davis deceased from the house from anybody? From Mr. Moore. Who was Mr. Moore? A real estate agent." The Court ruled this competent, and we do not think it was incompetent for the witness to show that he collected rent from the house in question, paid it over to Henry Davis, and the testimony at another time, during the trial, showed that Moore was a real estate agent, that he collected rent for the house in question during the lifetime of Henry Davis, and paid it over to Davis. In addition it appears from the testimony of John A. Sheorn that he was a real estate agent, and collected rents for this house from Rose Woodside, and that the rents were collected for Henry Davis, and paid over to John McLain, by instructions from Davis. The witness, George McLain, testifies to fact within his own knowledge that the rent was collected for Henry Davis, and that this statement was not based upon a statement made by Moore. This exception is overruled.

The second exception imputes error in admitting over appellant's objection the declarations of a stranger as to the pedigrees of Henry Davis, Eliza Villepigue, and

2 Allen. Mary Carter did not testify as to the declarations of any other party, but her testimony was as to facts within her own knowledge, the objection was

as to her testimony that she was not related to the parties, and could not testify as to family relation. The appellant has misconstrued the rules applicable to the introduction of declarations as to relationship. It is not necessary to show that the witness testifying is related to any of the parties, whose relationship is in question. There is no authority that so holds. Any person acquainted with a family, and reputation in the family, can testify as to the pedigree and relationship of members of the family, and as to common rumor in the community as to this pedigree and relationship, and as to the declarations of the family as to pedigree, kinship, relationship, marriages, births, etc. The witness' testimony was as to facts known to her, and it was competent for her to testify as to her familiarity with the family, and the reputation in the family, in regard to the relationship in question. John Carter, who was not a relative, was permitted to testify along same line without objection, and there was no evidence on part of appellant introduced at the trial in contradiction of that introduced by respondent as to relationship. "The evidence of a witness whose knowledge with reference to the subject was derived from an intimate acquaintance with the family is admissible as to such facts of the family history as marriages, kinship, name, and death." *Hoyt v. Lightbody*, 98 Minn. 189, 8 A. and E. Ann. Cases 9841. "Declarations of deceased persons as to pedigree of a person with whom they were closely connected in life though not related in blood or marriage have been held competent evidence." *Ency. of Evidence*, 742. See also section 991, *Wigmore on Evidence*, 1490.

The third exception complains of error in not allowing the witness, Rose Woodside, to repeat the whole of the conversation with Henry Davis, when part of it was brought out by attorney for respondent on cross-examination. By reference to what took place at the time complained of, it will be seen that the counsel for respondent

did not ask any question in regard to a conversation with Henry Davis, nor ask any question, which would require any part of such conversation in response to the question, and any answer by her to question asked, which brought in such conversation, was not responsive to the question, and his Honor had previously ruled out any conversation between this witness and Henry Davis, deceased, and properly sustained objection at this time as to any question asked witness as to conversation with the deceased Davis. This exception is overruled.

The fourth exception alleges error on the part of the Judge in charging the jury that Rose Woodside must have had the land for ten full years before the date of
3 the commencement of this action in May, 1910.

This was not a charge on the facts; it simply stated a date when action was commenced disclosed by the pleadings in the case. There was no controversy over this. "Statement of what facts are admitted or not contested is not a charge on the facts." *Trapp v. Western Union Tel. Co.*, 92 S. C. 218, 78 S. E. 210.

The fifth exception is overruled, as the Circuit Judge has the right in all equity cases to submit issues to jury, the pleadings raise both legal and equitable issues
4 and the legal issue as to title to land is triable by jury. *McCreery Land and Investment Co. v. Meyers*, 70 S. C. 282, 49 S. E. 484; *Poston v. Ingram*, 76 S. C. 167, 56 S. E. 780, section 312, Code of S. C. 1912.

All exceptions are overruled.

Judgment affirmed.

MR. JUSTICE FRASER *concurs in the result.*

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MIDDLETON, AS BISHOP, v. ELLISON.

CHURCHES—INJUNCTION.—Where the members of a church corporation are divided as to which faction is entitled to use the corporate name and control the property, the Courts are accustomed to enquire which party or division maintains the church organization as it existed before the division and to recognize that party. In all cases, except those in which complete or entirely peaceable possession is shown in the adverse faction, the Court will protect those adhering to the original organization in possession of the church property pending the litigation.

Before PRINCE, J., Charleston, October, 1912. Affirmed.

Action by E. Russell Middleton, as Bishop of the Reformed Methodist Union Episcopal Church, and the Reformed Methodist Union Church, against J. A. Ellison, T. C. Colclough, D. D. Ross *et al.*

The Circuit decree is:

“This is a suit for injunction brought by E. Russell Middleton, as Bishop of the Reformed Methodist Union Episcopal Church, and by the Reformed Methodist Union Church, a South Carolina corporation commonly known as The Reformed Methodist Union Episcopal Church. The action is brought against certain individuals, named as defendants herein, who, it is alleged, are claiming and assuming to be the regular church, are using the corporate name of the church, and are conspiring to injure and destroy the church and church government of the plaintiffs; it is further alleged that the defendants are creating disturbances and have caused conflicts to take place in some of the churches and congregations of the plaintiff corporation and are interfering with and undertaking to take possession of certain of the church property; it is also alleged that the defendants have undertaken to hold meetings in the name of the plaintiff corporation and have called a

meeting for November 4, 1912, to consider making certain changes in its charter.

"The matter comes before me now on an application for a restraining order, *pendente lite*, under a rule to show cause issued by me and duly served on the defendants, and under the return of the defendants and sundry affidavits submitted by both sides.

"Many points and questions of fact have been raised at the hearing before me which I do not consider it necessary or proper for me to pass upon at the present time. The action being for injunction, the matter to be decided here is whether, under the showing made by the affidavits submitted and by the pleadings, the plaintiffs have shown that there are substantial questions to be decided and that the status of affairs existing at the commencement of the action should be preserved.

"Without going into a discussion of the facts or of the questions involved, I am satisfied that the plaintiffs under the showing made are entitled to a temporary restraining order.

"The question which requires more consideration is as to what property the restraining order should apply to and on this point there is great conflict between the statements made by the contending parties.

"The controversy concerns itself with a scism in the Reformed Methodist Union Episcopal Church, which is a religious organization made up of numerous congregations and with a large membership in this State and in Georgia. Each side claims to be in possession of certain of the churches and to have certain congregations with it, and affidavits are submitted by each party to sustain its respective contention.

"While there seems to be a dispute that plaintiffs represent the original organization, yet prior to the spring of this year the defendants were acting as a part of the plaintiff organization under Bishop Middleton. The organiza-

tion has been known as the Reformed Methodist Union Episcopal Church for many years during which defendants were members of and identified with it. Under these circumstances, the defendants will not be heard now to question its right to use this name nor will the Court undertake to inquire into its ecclesiastical acts. In such cases, the Courts of law are accustomed to inquire which party or division maintains the church organization as it existed and to recognize this party. While not undertaking to decide finally this question at the present time, it has become necessary to consider the matter from this point of view, in view of the conflicting statements of the affidavits submitted.

“It appears that several of the defendants who now claim to be in possession under the defendant, Ellison, were appointed to these charges by the plaintiff Bishop and took possession under him. Since the scism in the church, many of the congregations under these defendants have been rent in twain and dissension and division exists amongst them. Having been appointed and having entered into possession under the Bishop, those of the defendants whose congregations are divided cannot claim to be in peaceable possession as against the Bishop and against that portion of their congregation who still support him. On the contrary, these pastors having been placed there by the Bishop, he and his supporters are to be regarded as still in possession under the circumstances disclosed at the hearing, unless full and legal possession is shown to have been obtained by the opposing faction. In all cases, therefore, except those in which complete or entirely peaceable possession is shown, the plaintiffs are entitled to be free from interference during the pendency of this action.

“In the churches of St. James in the St. James Circuit in Clarendon county, and of St. Peter’s and Zion in the Lake City Circuit, the plaintiffs concede the fact that all or practically all of the members of the congregations have sided

with the defendants and that the latter are practically in complete possession. In the case of St. Mark's Church in St. Andrew's Parish, Charleston county, it would also appear from the statements made that although plaintiffs claim that certain of the members are opposed to defendants, the large majority are with Ellison and his associates and no disturbances have occurred with reference to their possession.

"In these cases, I shall not interfere with the defendants and they may continue in their possession and control.

"With reference to the churches and congregations in the State of Georgia, I shall also not undertake to pass any order.

"With these exceptions, however, I think plaintiffs are entitled to a temporary restraining order against the defendants. It is therefore ordered that during the pendency of this action and until further order of the Court the defendants and all acting under them be and they are hereby restrained and enjoined from interfering with plaintiffs in the exercise of their rights, privileges and in performing their duties as a corporation as Bishop thereof respectively, in connection with the government of the said church and the direction and control of the congregation and places of worship thereof. * * *

Defendants appeal.

Messrs. Herndon & Monash and Davis & Weinberg,
for appellant.

Messrs. Davis & Weinberg cite: Corporation chartered by statute can only change its name by statute: 10 Cyc. 155, 156, 201, 210; 4 Ency. 204; 10 Rich. Eq. 604. Law courts must accept as final decisions of ecclesiastical courts: 13 Wall. 679; 1 Speer Eq. 87; 67 S. C. 341; 3 B. Mon. 253; 45 Mo. 183; 3 Pa. St. 291; 23 Ill. 456. The Bishop cannot maintain this suit without authority from the corporation:

67 S. C. 346; 20 Ency. 821; 11 So. 682; 18 N. Y. 379; 3 Grat. 215; 42 Ky. 253; 67 Ky. 215; 27 N. J. L. 539; 2 Thomp. on Corp., secs. 1068, 1071, 1161. *Court in such proceeding should not take property from possession of one and put it in possession of another:* 27 S. C. 415; 19 S. C. 286.

Messrs. Jno. D. Cappelmann, N. B. Barnwell and F. Wm. Cappelmann, contra, cite: Acts of ecclesiastical bodies are final in ecclesiastical matters: 13 Wall. 679; 91 N. W. 886; 67 S. C. 338; 14 L. R. A. 518. *After acquiescing in corporate action for a number of years, appellants cannot object now:* Code 1902, 2839, 2866; 76 S. C. 77; 67 S. C. 338; 6 Thomp. on Corp. 7374; 18 Am. D. 99; 4 Gill 498; Angell and Ames on Corp. 491, 495; 12 Vt. 688; 10 Conn. 200; 27 At. 998. *The local congregation form a part of the religious organization:* 13 Wall. 679. *The Courts will recognize that part of the church maintaining the church organization:* 13 Wall. 679; 24 L. R. A. 615; 14 L. R. A. 518; 34 S. W. 875; 8 Am. R. 275. *Those in full control of property are properly so left:* 92 S. C. 348; 69 S. C. 156; 67 S. C. 338; 72 N. W. 600; 35 At. 869; 9 Wheat. 841; 13 Wis. 348; 5 Am. R. 415; 63 S. W. 48; 199 U. S. 279.

June 30, 1913. The opinion of the Court was delivered by

MR. JUSTICE WATTS. For the reasons given by the Circuit Judge, the Hon. Geo. E. Prince, it is the judgment of this Court that the order made by the Circuit Judge be affirmed.

8600

WYLIE v. JEFFERSON STANDARD LIFE INSURANCE CO.

1. **INSURANCE—FORFEITURE.**—A policy of life insurance containing a provision that the policy becomes void on failure to pay premiums when due is not forfeited within the extension by failure to pay a premium, notice of which is given in a letter stating that the company grants thirty days' extension with interest.
2. **IBID.—IBID.**—THE STATUTE OF N. C. extending the time of forfeiture in certain cases expressly exempts policies of "a term insurance for one year."

Before WATTS, J., York, November term, 1911. Reversed.

Action by Ida M. Wylie against Jefferson Standard Life Insurance Company. Plaintiff appeals.

Messrs. J. S. Brice and Witherspoon & Spencer, for appellant, cite: *Forfeiture waived by defendant*: 25 Cyc. 858; Bliss on Ins. 311, 199; 35 A. R. 122; 44 N. Y. 276; 4 A. R. 675; 96 U. S. 572. *Waiver was not conditioned on payment in lifetime of insured*: Bliss 313-7; 321-2; 104 U. S. 767. *Defendant is bound by N. C. statute against forfeiture*: 179 U. S. 262.

Messrs. Wilson & Wilson, contra, cite: *Forfeiture for nonpayment is to be strictly enforced*: 104 U. S. 252; 93 U. S. 24; 105 U. S. 88; 177 Fed. R. 842; 46 Fed. 355; 74 Ala. 487; 88 N. Y. 54; 1 Mo. App. 300; 90 S. C. 1; 83 S. C. 262; 54 S. C. 371; 68 S. C. 391. *Sickness or incapacity is no excuse*: 105 U. S. 88; 177 Fed. 842. *Extension of time is no waiver*: 104 U. S. 252. *Premium has not been paid*: 104 U. S. 252; 144 U. S. 439; 54 S. C. 371; 44 N. Y. 276; 118 Fed. 250; 62 Md. 207. *Policy should be treated as a domestic charter contract*: 84 S. C. 253; 90 S. C. 544; 181 U. S. 76; Code 1902, 1719, 1787, 1790.

July 5, 1913. The opinion of the Court was delivered by

MR. CHIEF JUSTICE GARY. This is an action on an ordinary annual premium policy, issued on the eleventh day of October, 1905, by the Carolina Mutual Life Insurance Company, a domestic corporation, on the life of plaintiff's husband, payable at his death to her.

Payment on the policy was subsequently assumed by the Southern Life Insurance Company, and then by the defendant, Jefferson Standard Life Insurance Company, corporations of North Carolina.

The original policy contained the provision, that "in case the insured shall at any time fail to pay his dues and premiums in advance, in accordance with his policy, as therein provided for, his policy shall thereby lapse, and become null and void, and have no binding force against the association."

The insured died on the tenth day of November, 1909, having paid all annual premiums, except the one which was due on the eleventh day of October, 1908.

On the eighth day of October, 1909, the Carolina Mutual Life Insurance Company, through S. L. Miller & Sons, its duly authorized agents, wrote the following letter to the insured: "We beg to call your attention to the premium of \$16 on your policy in this company, which will be due on October 11th, but the company grants thirty days extension in which to pay the same, with interest at 5%. Hoping to hear from you with remittance, we remain." * * *

At the close of the plaintiff's testimony, the defendant's attorneys made a motion for nonsuit, upon which his Honor, the presiding Judge, ruled as follows:

"I would like very much not to grant a nonsuit in this case, but under the law I don't see how I can do otherwise. This premium was due on the 11th day of October, and he had 30 days from that time to pay it in, and he died within that time. He should have paid it within that time, or it

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ought to have been tendered, somebody ought to have tendered it for him. He had 30 days from the 11th day of October to pay that in. Sickness is no excuse under that authority cited by Mr. Wilson, and Mr. Wylie had until midnight on the night he died, to have paid this premium, and having failed to do it, it is gone by the board, according to my notion."

The effect of this ruling was to deprive the plaintiff, of the extension which was granted to the insured by the company. As the insured died within the time extended by the

company for payment of the premium, the policy was
1 in as full force and effect as it was at any time before
the 11th day of October, 1909, when the premium
fell due. The insured was entitled to the full thirty days' extension, and, therefore, at his death, the policy had not been forfeited. If, however, he had died after the thirty days had expired, without payment of the premium, the policy would have been forfeited.

His Honor, the presiding Judge, also ruled, that the statute of North Carolina, extending the time of forfeiture in certain cases, was not applicable to this case. The

2 policy in question is what is known as "a term insurance for one year," which kind of insurance is expressly excepted, from the provisions of the North Carolina statute.

It is the judgment of this Court, that the judgment of the Circuit Court be reversed, and the case remanded to that Court for new trial.

MR. JUSTICE HYDRICK *concurs in the result.* MR. JUSTICE WATTS *disqualified.*

8601

BETHEA v. WESTERN UNION TEL. CO.

TELEGRAPH COMPANIES—WILFULNESS—ISSUES.—There being evidence here that a death message to be transmitted forty miles on one wire was delayed on day received for two hours before close of office hours at office of destination and other business in meantime given preference, the issue of wilfulness was properly sent to the jury.

Before WILSON, J., March, 1912. Affirmed.

Action by G. F. Bethea against Western Union Telegraph Company. Defendant appeals.

Messrs. Geo. F. Fearons, Willcox & Willcox, Henry Buck, J. S. Mitchell and Lucian W. McLemore, for appellant, cite: Message could not be transmitted after office hours at office of destination: 73 S. C. 520; 71 S. C. 304, 386. Delay here is not sufficient to show wilfulness: 79 S. C. 160; 73 S. C. 379; 77 S. C. 399; 65 S. C. 93. The delict alleged must be the proximate cause of the injury: 72 S. C. 516; Jones, sec. 325; 70 S. C. 418. Jury is bound by charge: 1 S. C. 14; 19 S. C. 491; 20 S. C. 559; 68 S. C. 526.

Messrs. Townsend, Rogers & McLaurin, contra, cite: Long and unreasonable delay supports wilfulness: 90 S. C. 537; 84 S. C. 164; 65 S. C. 99; 84 S. C. 483; 87 S. C. 320; 77 S. C. 399; 90 S. C. 425. Notice of suffering for failure to deliver was shown on face of message: 77 S. C. 174; 73 S. C. 430; 69 S. C. 531; 70 S. C. 418.

July 5, 1913. The opinion of the Court was delivered by

MR. CHIEF JUSTICE GARY. This is an action for damages, alleged to have been sustained by the plaintiff, through the wrongful acts of the defendant, in failing to deliver the following telegram, within the time required by law:

“Florence, S. C., August 27, 1910.

“Wesley Bethea, Dillon, S. C. I will be in with corpse tonight. G. F. Bethea.”

The corpse mentioned in the telegram, was that of Ella Bethea, sister of the plaintiff and daughter of Wesley Bethea, to whom the message was sent.

The fourth and sixth paragraphs of the complaint, are as follows:

IV. "That plaintiff is informed and believes, that the said message was not received at Dillon, until nine forty-five o'clock a. m. on the 28th day of August, 1910, and was not delivered to the addressee, Wesley Bethea, until the morning of the 29th day of August, 1910, although the said Wesley Bethea, lived within a few hundred yards of the Dillon office of the said defendant, and was in and about his home continuously, from the time said message was delivered to the defendant at Florence, on the afternoon of the 27th of August, 1910, to the time when same was delivered to him, in the morning of the 29th day of August, 1910."

VI. "That the failure of the defendant to transmit and deliver said message promptly, as it was in duty bound to do, was wilful, wanton, and gross negligence of a plain duty, which it owed to this plaintiff, and by reason of the wilful, wanton, and gross negligence and failure of the defendant, to transmit and deliver said message, no one was at the depot, to meet the mortal remains of his said sister with conveyances, and carry them to the home of his father, and the corpse of his said sister, was obliged to lie unprotected and unattended at the depot in Dillon, for a considerable length of time."

The jury rendered a verdict in favor of the plaintiff for \$650, and the defendant appealed.

The appellant's attorneys in their argument say: "The principal question presented by the appeal is, whether the presiding Judge erred in refusing to direct a verdict in favor of the defendant, at the close of all the evidence, on the ground that there was no evidence, sufficient to take the issue of wilfulness to the jury.

We will proceed to the consideration of that question :

H. W. Seign, the telegraph operator at Florence, to whom the message was delivered for transmission, thus testified: "Do you recall any conversation that took place between you and the sender of that message? Yes, sir; I told him there would be some delay, on account I was there by myself. The manager was called out of town on account of his wife being sick, and it was piled up around there. You told him that, at the time you accepted the message? Yes, sir; I told him I didn't know how much it would be. Did you make an effort to send it to Dillon that night? Yes, sir. Why couldn't you send it? I was busy on other wires around there, and I didn't have very much time to get in a call. The wire, I think from Wilmington to Augusta, it was always piled up pretty near, and I didn't have the time I should have had to call him, on account of the manager being out of town. Was the Dillon office on that wire you speak of? Yes, sir. When you called him, you were not able to get him? No, sir; I didn't have very much time to call him; five or six times each time I called. At any time you attempted to call him, did you find him busy or the wire busy otherwise? I found him busy once, and the wire was busy otherwise. Are there not a number of offices on that same wire? Yes, sir.

Cross-examination :

"Mr. Seign, you saw by the terms of this message, that it was a death message? Yes, sir. Did you make any special effort to deliver that message? Well, I made all I could under the circumstances. And it was some time the next day, before you were able to get that message through? Yes, sir, on account of my being there by myself. Do you or not as a usual rule, try to give death messages preference to others? They are very common. So you don't make special effort? Yes, sir; they are supposed to go first. They have preference over the other business. This one didn't? We can't give them all preference. How many

death messages did you have that day? That afternoon from that time until this was transmitted? I don't think I had none. None at all? I don't think so. And still they are very common? Yes, sir. You say the business on that wire was much congested? Yes, sir. As a matter of fact, Mr. Seign, if you had made special effort, could you have gotten that message through here, before that time the next day? No, sir; if I had let all the other business go, and then if there be suits for other business—(interrupted). Don't tell that. If you had made special effort to get that message through, couldn't you have gotten it here before that time the next day? No, sir. Not even if you let it take preference over the other business? No, sir. Do you mean to say, Mr. Seign, as a matter of fact, if you had taken this message and given it preference to any other business, that you could not have got it here before that time? The office at Wilmington and Augusta, they are not going to allow you to keep the wires all day, on account they are piled up. Was there any other message sent from Florence to Dillon? No, sir; that was the only one sent. Do you mean to say that you told this plaintiff here, Garfield Bethea, that you couldn't get that message through right away? Yes, sir. You remember that? Yes, sir; and told the manager the same thing when he came to town, and I answered the statement on the papers."

This testimony tends to show upon its face, that there was a reckless disregard of the plaintiff's rights, in failing to transmit a message from Florence to Dillon, a distance of about forty miles, when the operator had more than two hours within which to send it, before the office at Dillon closed, and failed simply because there were other messages to be sent, but over which, death messages were entitled to precedence in transmission. The jury evidently did not believe this witness.

Judgment affirmed.

8602

FAIREY v. ZEIGLER.

1. CLAIM AND DELIVERY.—The papers used in motion to vacate claim and delivery proceeding were not sufficiently definite.
2. IBID.—The affidavit in claim and delivery on which the warrant was based, sufficiently set forth the facts on which claim of plaintiff for possession of property was based.
3. IBID.—EVIDENCE.—In claim and delivery right to possession may be shown by proof of chattel mortgage and of nonpayment of debt secured thereby.
4. IBID.—DAMAGES for withholding possession of chattels need not be specifically alleged.
5. IBID.—IBID.—That a mortgagee had instructed his agent to seize the mortgaged property, take it into an adjoining county and sell it, was not prejudicial to the rights of appellant here.
6. IBID.—Upon breach of conditions of chattel mortgage, title to the property mortgaged vests in mortgagee.

Before MEMMINGER, J., Hampton, December, 1912.
Affirmed.

Action by James C. Fairey against E. A. Zeigler. Defendant appeals. The affidavit and notices of motion referred to are:

"Personally appeared before me G. L. Salley, C. C. P. of Orangeburg county and the said State, James C. Fairey, plaintiff, who, being duly sworn, says:

I. "That he is owner of, or that he is entitled to immediate possession of, by reason of a chattel mortgage the following described property, to wit: 'One bay horse mule five years old, about fifteen (15) hands high, and also one brown horse mule, five years old, about fifteen (15) hands high.'

II. "That the said property is wrongfully withheld or detained by the defendant above named.

III. "That according to his best knowledge, information and belief, the cause of such withholding or detention is for the purpose of delay.

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IV. "That the said property has not been taken for any tax, fine or assessment, pursuant to statute or seized by virtue of an execution or attachment against the property of the plaintiff.

V. "That the actual value of said personal property is the sum of two hundred and fifty (\$250) dollars. James C. Fairey."

"Sworn to and subscribed before me this June 8, 1911.
(Seal) G. L. Salley, C. C. P."

Notice of motion.

"To Messrs. Glaze & Herbert, Attorneys for Plaintiff.

Please take notice:

"That the undersigned counsel for the defendant herein will move before his Honor, Judge J. W. DeVore, at his chambers in the town of Hampton, South Carolina, on the 22d day of June, 1911, at ten o'clock in the forenoon on the said day, or as soon thereafter as counsel can be heard, for an order vacating, setting aside and dismissing the proceedings had and taken in connection with the above entitled case for the delivery of the personal property described in the complaint herein, and relieving the said defendant from his obligation on the replevin bond given by said defendant herein to prevent the delivery of the said property to the plaintiff herein, the said motion being based on the grounds that the said proceedings were and are illegal and void.

"That this motion will be made on the pleadings and proceedings of the plaintiff herein and the attached affidavit. J. W. Vincent, Attorney for Defendant."

Notice of motion.

"To Messrs. Glaze & Herbert, Attorneys for Plaintiff.

Please take notice:

"That the undersigned counsel for the defendant herein will move before his Honor, Judge J. W. DeVore, at his chambers in the town of Barnwell, South Carolina, on the 18th day of July, 1911, at ten o'clock in the forenoon on

said day, or as soon thereafter as counsel can be heard, for an order vacating, setting aside and dismissing the proceedings had and taken in connection with the above entitled case for the delivery of the personal property mentioned and described in the affidavit and complaint in this action, and relieving the said defendant from his obligation on the replevin bond given by said defendant herein to prevent the delivery of the said property to the plaintiff herein, the said motion being based on the grounds that said proceedings were and are illegal and void, in that the affidavit on which the process issued to deliver the property to the plaintiff does not state facts sufficient to constitute a cause of action against said defendant, or sufficient to warrant the taking of the property of the defendant by the plaintiff herein, there being no facts showing that the plaintiff is or was entitled to the immediate possession of the property.

"That this motion will be made on the pleadings and proceedings herein and on the attached affidavit. J. W. Vincent, Attorney for Defendant."

Defendant's Exceptions.

1. "His Honor, Judge J. W. DeVore, erred in holding and deciding on the first motion of the defendant to vacate the claim and delivery proceedings herein, that the notice of motion was not sufficiently definite, and in requiring the defendant to renew said motion and give more specific grounds of the motion, it being submitted that the said motion papers were sufficiently definite to apprise the plaintiff of the grounds of the motion.

2. "That his Honor, Judge J. W. DeVore, erred in refusing the second motion of the defendant to vacate the proceedings of the plaintiff in this action, heard at Barnwell, S. C., on the 25th day of July, 1911; it being submitted that the affidavit of the plaintiff, on which the action or proceeding for the immediate delivery of the property was based, was not sufficient, under the law, to warrant the taking of the property from the possession of the defendant, in this:

section No. 258, Code of Procedure, 1912, subdivision 1, requires that the plaintiff shall make an affidavit, that he 'is owner of the property claimed,—or is lawfully entitled to the possession thereof, by virtue of a special property therein, *the facts in respect to which shall be set forth,*' and this requirement was not complied with for the reason that no facts were set forth, on which he based his claim.

3. "His Honor, Judge R. W. Memminger, erred in admitting in evidence the chattel mortgage, over the objection of defendant, for the reason that, inasmuch as the plaintiff had alleged, in his affidavit and in his complaint, that he was the owner of the property claimed, any evidence showing a special property therein was irrelevant and prejudicial.

4. "His Honor, Judge Memminger, erred in admitting any evidence offered by the plaintiff to show that the plaintiff had the right to the possession of the property by virtue of the nonpayment of a debt secured by a chattel mortgage from the defendant to the plaintiff, same being irrelevant under the allegation of ownership.

5. "That his Honor, Judge Memminger, erred in admitting in evidence, to wit: the chattel mortgage and the verbal testimony of witnesses, as to the right to the immediate possession of the property claimed by the plaintiff, the allegation, 'and of which the plaintiff is entitled to the immediate possession,' being a conclusion of law merely without stating the facts with respect to said right; his Honor should have excluded all said testimony as irrelevant.

6. "His Honor erred in admitting evidence of the witnesses, Ed Newlin, and plaintiff himself as to any damage claimed by the plaintiff, there being no allegation in the complaint as to damages.

7. "His Honor erred in refusing defendant's motion for a directed verdict in his behalf on the ground that there was a total variance between the allegata and probata, in this, the complaint alleged that the plaintiff was the owner of the property, whereas, the proof was that he merely claimed

the right to the possession of the same by virtue of that special property given by the law where the mortgagor defaults in the payment of the mortgage debt.

8. "His Honor erred in refusing the defendant's motion for a directed verdict on the grounds that the evidence of the plaintiff's own witness as well as that of the defendant, showed that the plaintiff had instructed his agent, John Kennelly, the witness referred to, to seize the property, take it out of the county and sell it; it being submitted that the plaintiff did not have the right to take the property from the defendant for the purpose of selling it in another county than the one where the defendant resided.

9. "His Honor erred in charging the jury that the plaintiff in this action *seeks* to recover from the defendant fifty dollars damages in this action, it being submitted that there is no allegation in the complaint as to any damages claimed by the plaintiff.

10. "His Honor erred in charging the jury that 'Consequently, under law, the conditions of the mortgage being broken the ownership of the property became vested in the plaintiff,' it being submitted that the breach of the condition of a chattel mortgage does not vest the ownership of the property in the mortgagee, but merely the right of the plaintiff to the possession of the property for the purpose of selling the same in satisfaction of the mortgage debt.

11. "His Honor erred in charging the jury, 'If you decide that a demand was made and Zeigler should have given up the mules and nevertheless has kept them he would be liable in such damages as the evidence shows that Fairey sustained by not being able to get possession of these mules and you must decide from the evidence what amount of damages you would fix,' it being submitted that the plaintiff was not entitled to any damages whatsoever, there being no allegation in his complaint as to any damages."

Mr. J. W. Vincent, for appellant.

Messrs. Glaze & Herbert and J. W. Manuel, contra.

Messrs. Glaze & Herbert cite: Requisites of affidavits: 85 S. C. 346. After condition broken legal title of chattels mortgaged vests in mortgagee: 91 S. C. 124; 85 S. C. 347; 31 S. C. 164; 22 S. C. 20; 44 S. C. 315; 23 S. C. 282. Damages for detention need not be alleged: 70 S. C. 102; 23 S. C. 285; 65 S. C. 284; 66 S. C. 394. Where mortgagee converts property to his own use, he forfeits balance of debt: 28 S. C. 258; 31 S. C. 168; 73 S. C. 403; 78 S. C. 531.

July 8, 1913. The opinion of the Court was delivered by

MR. CHIEF JUSTICE GARY. This is an action in claim and delivery, for certain mules, and resulted in a verdict in favor of the plaintiff.

The defendant appealed upon exceptions, which will be reported.

It seems that the appellant does not contemplate any relief in so far as the merits of the case are involved, and that the sole purpose of the appeal, is to reverse the judgment in order that the defendant, may not be compelled to pay the costs of the case; for his attorney in his argument says: "If the cost item could be eliminated, the defendant is cheerfully willing to deliver the property to the plaintiff or pay the debt in full."

While the defendant has appealed upon eleven exceptions, he has not cited a single decision to sustain any of them:

First Exception: The appellant's attorney did not
1 argue this exception, which is clearly untenable.

Second Exception: It is only necessary to refer to
2 the affidavit, to show that this exception can not be sustained.

Third, Fourth and Fifth Exceptions: We fail to
3 see wherein the rulings mentioned in these exceptions were prejudicial to the rights of the appellant.

Sixth Exception: The authorities cited in the argument of the respondent's attorneys clearly show, that this exception can not be sustained.

Seventh Exception: What has already been said disposes of this exception.

Eighth Exception: It has not been made to appear, that the facts mentioned in said exception, in any respect affected the right of the plaintiff in this case.

Ninth Exception: What has already been said, disposes of this exception.

Tenth Exception: The ruling of his Honor, the presiding Judge, is fully sustained by the authorities cited in the argument of the respondent's attorneys.

Eleventh Exception: What has already been said, disposes of this exception.

Appeal dismissed.

8603

McNAIR v. JOHNSON.

DEEDS—DESCRIPTION—FORECLOSURE.—Where in a foreclosure complaint the land mortgaged is described as it is in the mortgage and the decree adjudges that the mortgaged premises described in the complaint be sold, but the description given at the foot of the decree as of the premises mortgaged is of a different tract of land, but the sheriff advertised the land as described in the mortgage and so described it in his deed, his deed conveys to the purchaser the land described in the mortgage.

Before HALCOTT P. GREEN, Special J., Chesterfield, November term, 1912. Reversed.

Action by B. E. and Albany McNair against Fanny and Charles Johnson. Plaintiffs appeal.

Messrs. Stevenson & Prince, for appellants, cite: *Upholding judicial sales*: 21 S. C. 75; 83 S. C. 165; 40 S. C. 78; 23

S. C. 516. *Presumption from lapse of twenty years*: 1 Hill Ch. 378; 79 S. C. 302. *Court at chambers could correct clerical error in record*: Freeman on Judg. 623; Code Proc. 402; 21 S. C. 11; 14 Rich. 64; 1 Hill 239, 167; 2 Hill 475, 447; 3 McC. 142; 2 McC. 48, 249; 1 McC. 323; 71 S. C. 250; 73 S. C. 582; 69 S. C. 570.

Mr. W. P. Pollock, contra.

July 9, 1913. The opinion of the Court was delivered by

MR. CHIEF JUSTICE GARY. This is an action to recover possession of the tract of land described in the complaint, and the appeal is from an order of nonsuit.

Andrew Johnson, the defendant's ancestor, executed a mortgage in favor of Calvin B. McNair and plaintiffs' ancestor, on "all that piece, parcel or tract of land, situate, lying and being in the county and State aforesaid, and bounded by lands of J. J. Burch and D. T. Redfearn, containing three hundred and five acres. Reference to a deed from Joseph S. Burch to J. J. Johnson will more fully appear."

The mortgage was foreclosed and in the judgment of foreclosure, it was "adjudged that the mortgaged premises described in the complaint in this action, * * * be sold at public auction, in the county of Chesterfield, by the sheriff of said county." * * *

At the conclusion of the judgment of foreclosure, the property ordered to be sold is thus described: "All that certain piece, parcel or tract of land, situate, lying and being, in the county and State aforesaid, on the waters of Indian Creek, containing three hundred acres, more or less, and is bounded as follows: On the north side by lands of J. F. Meyers, Jno. D. Barber and Lou W. White, and Indian Creek; on the east by lands belonging to the estate of Elizabeth White, deceased; on the south side by lands of Mary J. and Carolina R. Mulloy, and on the west side by lands

belonging to, or in the possession of, Dollie Pitts, and others,"—an entirely different tract from that described in the mortgage. The property described in the mortgage, was advertised and sold by the sheriff to Calvin B. McNair, who died intestate in 1905.

The description of the property in the deed of conveyance, executed by the sheriff to Calvin B. McNair, was the same as that mentioned in the mortgage; and the mortgaged property was properly described in the complaint for foreclosure.

His Honor, the presiding Judge, granted a nonsuit, on the ground that the wrongful description of the property in the judgment of foreclosure, rendered the sale of the property by the sheriff null and void; and the sole question properly before the Court for consideration, is, whether said ruling was erroneous.

One of the maxims recognized in Broom's Legal Maxims (star page 605) is: "Mere false description does not make an instrument inoperative" (*falsa demonstratio non nocet*). The author in commenting thereon uses this language: "*Falsa demonstratio* may be defined to be, an erroneous description of a person or thing, in a written instrument; and the above rule respecting it, may be thus stated and qualified as soon as there is an adequate and sufficient definition with convenient certainty of what is intended to pass, by the particular instrument, a subsequent erroneous addition, will not vitiate it." The judgment of foreclosure refers to "the *mortgaged* premises described in the complaint in this action," and was sufficient to put all parties (especially those who were parties to the action and their privies), upon inquiry, which, if pursued with due diligence, would have shown the true description, not only from the mortgage, but from the complaint, to which reference was made. Therefore, the description in the judgment of foreclosure was not rendered inoperative, by a subsequent erroneous addition.

Another maxim of the law applicable to this case is: "That is sufficiently certain which can be made certain."

In Devlin on Real Estate, vol. 2, section 1012, the author says: "A deed is not void for uncertainty, because there may be errors or an inconsistency, in some of the particulars. * * * Generally the rule may be stated to be, that the deed will be sustained, if it is possible from the whole description, to ascertain and identify the land intended to be conveyed." In a note to that section it is said: "As that is certain which can be made certain, the description, if it will enable a person of ordinary prudence acting in good faith and making inquiries, which the description would suggest to him to identify the land, is sufficient." He also says: "Where there are several calls in a deed, and with the exception of one, they may all be applied upon the face of the earth, constituting an intelligent and correct description of the lot, to which they refer, the one that does not apply, will be rejected as surplusage and the other will prevail * * * If the deed contains two descriptions, one correct and the other false in fact, the latter should be rejected as surplusage. Where one of two different descriptions applies to land, to which the grantor had title, and the other to land which he did not own, the former will be taken as the true description, and the latter will be rejected as false. If sufficient remains after rejecting a part of the description which is false, the deed will take effect" (section 1016).

These principles are applicable to this case, and show conclusively, that it was error to grant the nonsuit.

It is the judgment of this Court that the judgment of the Circuit Court be reversed and the case remanded for a new trial.

MR. JUSTICE WATTS *disqualified*.

8604

DIMERY v. BENNETTSVILLE & CHERAW R. R. CO.

1. CHARGE.—Where a plaintiff in laying the ground for contradiction by cross-examining the defendant's witness, the Judge says his statement now is more favorable to you (the plaintiff), and plaintiff's counsel assents thereto, there is no discussion of the evidence or charge on the facts.
2. RAILROADS—LICENSEE—TRESPASSER—NEGLIGENCE.—It is the duty of an engineer in charge of a locomotive to use due care to prevent injury to children seen by him on the track in a perilous condition, whether they are licensees or trespassers.

Before JOSEPH A. McCULLOUGH, Special J., Marlboro, November, 1912. Affirmed.

Action by Georgia Dimery against Bennettsville and Cheraw Railroad Company. Defendant appeals.

Messrs. Stevenson, Stevenson & Prince and *D. D. McColl*, for appellant.

Messrs. Stevenson, Stevenson & Prince cite: *An opinion from the Judge is as harmful as an instruction*: 87 S. C. 244; 57 S. C. 243; 70 S. C. 183; 52 S. C. 540. *The same duty is not due a trespasser as a licensee*: 85 S. C. 360; 90 S. C. 335; 86 S. C. 111; 64 S. C. 25; 93 S. C. 347, 57.

Mr. J. K. Owens, contra, cites: *Remarks of Judge to attorney in course of trial is not error*: 61 S. C. 17; 72 S. C. 350; 71 S. C. 137; 78 S. C. 502; 73 S. C. 379; 87 S. C. 407; 65 S. C. 169; 69 S. C. 460. *A railroad company owes due care to one discovered on its track in peril*: 61 S. C. 559; 93 S. C. 329; 57 S. C. 252; 70 S. C. 192; 58 S. C. 75; 64 S. C. 7; 23 S. C. 535.

July 11, 1913. The opinion of the Court was delivered by

MR. JUSTICE FRASER. This was an action for damages. The plaintiff, by her guardian *ad litem*, alleges that she is an infant of about nine years of age, and that on or about the 7th of March, 1910, was working in company with her older sister along, by and then upon the track of the defendant, railroad company, when her foot became fastened in the irons forming the switch and when the plaintiff and her sister were engaged in endeavoring to rescue her therefrom, the defendant grossly, recklessly, carelessly and wantonly ran its engine and tender backwards upon the plaintiff and cut off her foot. The defendant denied negligence on its part and pleaded contributory negligence. The jury found a verdict in favor of the plaintiff and judgment was entered upon the verdict. From this judgment the defendant appealed upon six exceptions.

The first exception complains of a remark by the presiding Judge to plaintiff's attorney, and the other five to the charge of the Judge.

The first exception is as follows: 1. "The defendant excepts to the following incident of his Honor, the presiding Judge, at the trial: Question by Mr. J. K. Owens in cross-examination of J. W. Page: 'That is two hun-

1 dred or two hundred and fifty, and your idea at that time was it was one hundred and fifty? I do not recall exactly; it was further than two hundred yards.' The Court: 'His statement is more favorable to you than it was before, isn't it' (addressing Mr. Owens). 'Mr. Owens: Yes, sir.' The defendant respectfully submits that this was a discussion of the evidence by the Court in the presence of the jury, and an expression of opinion that this witness was giving more favorable testimony at this time than he had on a former occasion; and we submit was error."

This was defendant's witness. The plaintiff's attorney was laying the foundation for a contradiction. In effect his Honor said, there is no use for this, as the witness is giving testimony more favorable to you than he did before. The

remark was really a protection to the defendant's witness and was a question to counsel and not a charge to the jury.

This exception is overruled.

The other exceptions are not separately considered in argument and will not be considered separately here. They are as follows:

2. "The defendant excepts to the following charge of his Honor, the presiding Judge: 'Now, gentlemen, whether one is a licensee or whether one is a trespasser, makes very little difference under certain circumstances,' and also by

2 the following statement referring back to this statement, to wit: 'Now, if you see a person in a line of danger, whether that person be a licensee or whether that person be a trespasser, from the moment you discover that they are in a position of peril, then the law says you are due them care, due care, not to injure them, the moment it is discovered that they are in a position of peril.' The error being that he had previously told the jury that in this case and in cases like this, there is practically no difference between a licensee and a trespasser from the standpoint of the defendant; the same being error of law, in that a higher degree of care is required under the circumstances not to injure a licensee than is required as to a trespasser.

3. "In laying down the rule in his charge that a trespasser is entitled to due care instead of being entitled merely to exemption from wilfulness, in the following language: 'It is for the jury to say whether or not there is anything in their condition or situation or surroundings that ought to apprise the engineer or other parties in charge of the train that they are not in possession of their faculties, or have not absolute control over their movements, and if they appear disabled or otherwise in a condition where they are not prepared to take care of themselves, then the law says it is the duty of those in charge of the train of cars to use due care to prevent injuring them. And right here, gentlemen, is a very impor-

tant and material fact to consider in this case. Was the plaintiff in a position of peril?

4. "He further erred in making the following charge: 'By the exercise of ordinary care and prudence after having discovered the presence of the plaintiff upon the railroad track, if the plaintiff was upon the track, was there anything in the surrounding circumstances that ought to have apprised those in charge of this train that this party was in a position of peril, or was disabled? If you believe those to be the facts, and if so, were they apprised in time to stop the train and prevent the injury? If so, it was their duty to use every reasonable facility at their hand so to do;' in that he required a higher degree of care, to wit: the use of every reasonable facility at their hands to avoid injuring the plaintiff, and this under a charge that made no difference between a licensee and a trespasser, and thereby allowing the jury to base their verdict against the defendant, not on failure to use ordinary care, but on failure to use every reasonable facility or means to avoid injury to the plaintiff; and he erred in laying down this rule, especially where he embraced a trespasser and a licensee under the same rule.

5. "The Court erred, it is respectfully submitted, in charging the jury as follows: 'But if, gentlemen of the jury, they discovered the presence of these people upon the track, and if they saw after that discovery, or could have seen by the exercise of ordinary care, that they did not recognize or obey the signals, then it is for you to say just what the distance was. Could they have stopped the train by the exercise of ordinary care? If so, and they did not do it, and the girl was injured, then the railroad company would be responsible. But, gentlemen of the jury, if they did not, if they did everything after discovering the perils of the party, the dangerous position, everything that a reasonable party could do in order to stop the train and avoid the injury, if they did that, then they are not responsible. Now, that is a fact for you to consider, and in considering it, you will take into

consideration all of the testimony. You have heard it, you were there, and you have heard the various witnesses testify as to what they did. You will consider how much time must have elapsed from the time the party was placed in a position of peril, if you believe she was so placed, until the engine ran over her foot, and it is undisputed that the engine did run over her foot. Answer whether or not the railroad company did everything that a reasonable person could do under the circumstances after discovering the peril of the party, in order to stop the train.' The error being that he again placed in two or three paragraphs, and emphasized it in the last paragraph the burden of showing that the defendant did everything that a reasonable person could do under the circumstances, after discovering the peril of the party, whether the party was a trespasser or licensee; and we submit it was error in applying this rule to all classes of persons on a railroad track, and especially under the evidence in this case.

6. "The Court erred, it is respectfully submitted, in charging the jury as follows: 'Assuming, for the purpose of inquiry, that the girl was guilty of contributory negligence, in going on the track in the first instance, assuming that, yet if she became in a position of peril and danger, and the railroad company saw it in time to have avoided injuring her, and didn't use due care after it discovered her position of peril, and that was the sole cause of her injury, then the plaintiff's prior negligence, if she were guilty of negligence, would not defeat a recovery, because under the circumstances that negligence would not be a proximate cause of the injury.' 'Ordinarily the proximate cause is a question of fact for the jury, but under the facts as I stated to you, I charge you that, if notwithstanding her negligence, the railroad company could have avoided the injury to her by the exercise of due care, after they discovered her peril, if she were in peril, and did not exercise that due care after they discovered that she negligently put herself in that posi-

tion, if she did so, she would nevertheless be entitled to recover at your hands.'

"The error being that he told them that if by the exercise of due care although the plaintiff was guilty of contributory negligence, the railroad could have avoided the injury, then the contributory negligence was not the proximate cause of the injury. The error being, first, in undertaking to say that the negligence which brought about the injury was not a proximate cause, thereby taking that issue from the jury; and, second, requiring the railroad company to exercise due care when there was no question but that she was nothing but a licensee, and the railroad company was ordinarily required to exercise ordinary care, and if she were a trespasser the railroad company was only required to refrain from wilfulness in injuring her. It is respectfully submitted that error in all these particulars was committed by the said charge."

In the Carter case Mr. Justice Watts, then Circuit Judge, charged the jury fully as strongly as did special Judge McCullough in this case. Appellant's 8th exception was as follows, 93 S. C., pages 334-335:

8. "Because his Honor erred in charging the jury as follows: 'Now, I charge you further, as a matter of law, that a railroad company in running its cars over its track has a right to assume in the absence of anything to the contrary, or any proof to the contrary, that when a person is walking on its track and they see or hear the approach of a train, or if they give the necessary signals and everything of that sort, they have a right to assume that the party walking on the track will get off the track and get out of the way of the approaching train. At the same time, the law requires the engineer, the party in charge of the train, the locomotive running it, to observe due care and due precaution not to inflict injury on any person that is on the track. They must observe due care and due precaution, exercise the ordinary care, do what an ordinary, prudent person would do under

similar circumstances not to inflict any injury on any person on the track and give the necessary signals, and they don't get off, and there is any reasonable way whereby he can stop the train and prevent the injury, and he doesn't observe due care and due precaution, but is careless and negligent, and doesn't observe due care and due precaution and injure any one under circumstances of that sort, and the party injured doesn't by any act of carelessness and negligence on his part in any manner contribute to the direct and proximate cause of his injury, then the party injured or the party suing for him would have a right to recover such actual damages as he sustained proportionate to the injury sustained,' the error being that such charge was confusing to the jury, inasmuch as his Honor failed to distinguish between the duty owed a licensee and a trespasser, and thus charged the jury that even if, under the facts, the jury should find that plaintiff's intestate was a trespasser, still the defendant company would be liable, if it failed to observe due care and due precaution, or failed to exercise ordinary care; whereas, the law is that if he was a trespasser, the mere failure to observe due care or ordinary care would not render the defendant liable."

This exception was overruled. He charged that, after seeing a person in a perilous position, those who handle dangerous machinery must exercise due care, and if there is *any reasonable way* whereby they can stop the train and prevent the injury, they are bound to do it. That charge was sustained.

This is a very much stronger case for respondent than the Carter case. In that case the person injured was an adult. In this case there were two children, the oldest about fourteen, and the one injured about nine. There was only an engine and tender, with no alleged reason to hurry. Those in charge of the train saw these children in a perilous position and made no effort to stop until it was too late to avoid injury.

In the Carter case, Mr. Justice Watts said: "If they see any one" in a position of danger on the track, they are bound to use any reasonable way to prevent injury. There was no charge on the facts. His Honor said, "if you find." These exception are overruled.

The judgment appealed from is affirmed.

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LATIMER v. COUNTY OF ANDERSON.

1. HIGHWAYS.—Where there is evidence that one in charge of repairing a highway stretches a rope across the road some distance from the work which the driver of an automobile, looking ahead runs into without seeing, and a passenger is injured, nonsuit was properly refused.
2. *IBID.*—ISSUES—NEGLIGENCE.—Whether it is negligence to stretch a rope across a highway, without any other sign, to warn travelers that the highway is being repaired, is for the jury.
3. *IBID.*—CHARGE.—The portion of the charge here complained of as being on the facts is only an instruction that if county officers negligently placed a rope across a highway, the county would be liable.
4. *IBID.*—*IBID.*—NEGLIGENCE.—There was no request here to charge nor evidence to base, the doctrine of negligence of those engaged in a common enterprise, upon.
5. *IBID.*—*IBID.*—There was no request to instruct the jury that a passenger in an automobile could not recover for injuries caused by the machine being negligently driven into an obstruction on a highway.
6. *IBID.*—CITIES AND TOWNS.—In so far as the law affects this case the statute requiring cities and towns to keep the streets in repair are similar to those requiring county officers to keep the highways in repair.

Before SHIPP, J., Anderson, February, 1913. Affirmed.

Action by Virginia Latimer against County of Anderson.
Defendant appeals.

Messrs. Breazeale & Pearman, for appellant, cite: *The plaintiff should not recover for the negligence of another than the county*: 27 N. E. 522; 91 N. E. 306; 72 N. E. 77; 17 N. E. 538; 52 At. R. 844; 38 Vt. 439; 79 N. E. 876. *Recovery can only be had for injury caused by negligent repair or defect in the highway*: 20 S. C. 496; 27 S. C. 419; 34 S. C. 144; 45 S. C. 392; 38 S. C. 282; 17 N. E. 541; 80 N. E. 5. *County is only liable for authorized acts*: 39 S. E. 316; 28 Cyc. 586; 11 Cyc. 498. *Not liable for negligent acts of others*: 20 S. C. 496; 27 S. C. 449; 40 S. C. 591; 38 S. C. 282; 89 S. C. 511. *As to charge on the facts*: 53 S. C. 452; 31 S. C. 234; 67 S. C. 456; 51 S. C. 460; 47 S. C. 523; 91 S. C. 512; 90 S. C. 461; 93 S. C. 267. *Passenger's attitude toward driver should be considered*: 81 S. C. 113; 29 L. R. A. (N. S.) 179; 52 At. 543; 116 U. S. 371; 159 Fed. 18; 17 N. E. 202; 79 N. E. 878.

Messrs. Bonham, Watkins & Allen, contra, cite: *Stretching the rope across the highway was a defect or negligence in its repair*: 43 S. C. 401; 89 S. C. 520; 66 S. C. 448; 127 N. Y. 40; 36 Conn. 320; 18 Hun. 146; 106 Wis. 403; 85 Ia. 346. *Charge not on the facts*: 92 S. C. 188; 91 S. C. 178; 93 S. C. 375; 90 S. C. 422, 462; 88 S. C. 520, 386. *The negligence of the driver is not imputable to the passenger*: 8 L. R. A. (N. S.) 597; 51 Fed. R. 174; 35 Minn. 522; 66 S. C. 47.

July 11, 1913. The opinion of the Court was delivered by

MR. JUSTICE FRASER. This was an action for damages. The following statement appears in the case:

"The plaintiff, by her guardian *ad litem*, brings this action against the defendant for damages for personal injuries caused by the automobile, in which she was riding, running into a rope stretched across the highway, alleging negligence of the agents of the county in placing said rope across said highway at a dark place, in the woods and no light or sign,

nor notice of any sort was posted to show it was there; and it was stretched at such a height as not easily to be seen, said rope was being used in the repair of the highway, and was far removed from the place where the road hands were at work, that no person would look for a rope across the road at such place.

"That she was not negligent nor did she in any way contribute to the injuries received. The defendant admitted its corporate capacity and its duty to keep the roads in repair, and denied all the allegations of the complaint.

"On the trial of the case, before Judge Shipp, and a jury, at February term, 1913, the defendant, at the conclusion of plaintiff's testimony, moved for a nonsuit, which was overruled. The jury found for the plaintiff one thousand dollars damages. Motion for new trial was made and refused. Judgment was entered upon the verdict. The defendant gave notice in due time of intention to appeal to this Court, and now appeals from said judgment upon the case and exceptions following.

"(Defendant's attorneys admit that on trial of the case they did not contend that the negligence of the driver of the car was imputable to the plaintiff.)"

The exceptions are as follows:

Exception I. "That his Honor, the presiding Judge, erred in overruling the defendant's motion for nonsuit made on the grounds that the testimony of plaintiff failed to prove that the injuries complained of was through the negligent repair of the highway or that the rope across the road was being used in repair of the highway, or that said injuries were caused by the negligence of the defendant; and he should have, therefore, granted the said motion because the plaintiff had failed to prove the necessary facts to make the defendant liable under the provisions of section 1972, vol. I, of Civil Code."

In the recent case of *Stone v. Florence*, 94 S. C. 377, 78 S. E. R. 24, we have: "To keep a street in repair means to

keep it in such physical condition that it will be reasonably safe for all purposes. It is not enough that the surface should be safe. A street is not in repair when poles or wires or other structures are so placed in or over it as to be dangerous to those making a proper use of the street." See other cases there cited.

The complaint is made that his Honor said that the statute governing city and county is the same. So far as it applies to this case that is not error. There was evidence that the plaintiff was riding along the public road at the rate of twelve miles an hour, less than is permitted by the statute, and that the driver of the car was looking ahead of him at the road and did not see the rope until he struck it. There was evidence that the rope was put there by one, Cochran, who was in charge of the work for the county on that road. There was evidence that the driver was looking and did not see.

Now, as to whether it was negligence to tie a rope across the road without any sign, other than the rope, to indicate its presence, particularly where there is testimony to
2 show that the place was dark, was a question for the jury, and his Honor committed no error in refusing the nonsuit.

This exception is overruled.

Exception II. "That his Honor erred in charging the jury as follows: 'Now, if you come to the conclusion that the county officers engaged in the repair of the public highway,
3 placed the rope in question in this case across the public road, you ask yourselves the question, did they place it there in a way in which a person of ordinary prudence would have placed it there under the same circumstances? Did they place it at such a height that a person of ordinary prudence would have placed it? Did they place it in such a place as would be sufficient to warn people who were legitimately using the highway or would a person of ordinary prudence have placed something more than a rope

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there? You ask yourselves the question, was the rope itself sufficient warning for the travelers who were legitimately using the highway? Or, would a person of ordinary prudence have done something more than place the rope there? Would they have placed a warning there to warn the people or would they have hung a light there, or would they have done anything?

“ ‘Did the county officers manage that rope in the way that a person of ordinary prudence and care would be expected to do under the same circumstances? Now, that is the test in this case. Now, if the county did not do that, did not do what a person of ordinary prudence would have done under the circumstances, why, then, I charge you that would be negligence.’

“The error being that said charge was on the facts and in violation of section 26, article V, of the Constitution of the State, in that it was a statement in interrogative form, of the facts in issue in the case and contained a strong intimation to the jury as to his opinion of the facts. And, further, that was a statement of what facts constituted negligence, in that it was a statement that if the county did not do these things which he had asked the jury to inquire if they had done, then that would be negligence. And there was further error in said charge in that it assumed that the plaintiff was legitimately using the highway, which the defendant had denied.”

This charge was not on the facts, as one sentence will show: “Now, if you come to the conclusion that the county officers engaged in the repair of the public highway placed the rope in question in this case across the public road, you ask yourselves the question, did they place it there in a way in which a person of ordinary prudence would have placed it there under the same circumstances.” That is not a charge on the facts. It simply says that it is negligence to do anything negligently, that’s all. That is a proposition of law and not a statement of fact.

This exception is overruled.

Exceptions III and IV. "That his Honor erred in charging the jury as follows: 'Now, I charge you that where a person is a passenger in a private vehicle or automobile, that the negligence of the driver of the automobile cannot

4 be imputed to the passenger unless the passenger had some right to manage or control the driver, unless some relation of master and servant existed between them or some relation of principal and agent, unless the driver was the agent of the passenger, that there was relation of master and servant. That is, unless the passenger had employed the driver as his servant, as his agent. So, unless there is testimony in this case showing that Virginia Latimer had the right to control the operation of the machine and give directions about the operation and control of it, why, she cannot be held liable, and it would not affect her case if you should find that the driver was negligent.'

"The error being, that by said charge his Honor eliminated from the consideration of the jury the question whether the plaintiff, 'in any way brought about such injuries by her own act,' as the defendant contended she did by laughing, talking and entertaining the driver and attracting his attention from his business of driving the machine; and, further, that it did not contain the correct law as to imputed negligence by not including in said charge the exception of persons engaged in a common enterprise, as said exception was pertinent to the case and applicable to the facts as contended for by the defendant.

IV. "That his Honor erred in charging the jury as follows: 'If the county was not negligent, the county would not be responsible at all. Or if the county was negligent, and notwithstanding, that fact, the accident happened entirely by the negligence of the driver, the county would not be responsible. But if the county was negligent and the negligence of the county concurred and combined with the negligence of the driver, why, then, the county would be responsible. If

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the county was negligent and the negligence of the county, in connection with the negligence of the driver, if the driver was negligent, combined as the proximate cause of the injury of Virginia, if she was injured, why, Virginia could recover.'

"The error being that it eliminated from the consideration of the jury the question of the negligence of the plaintiff in attracting the attention of the driver from looking out for obstacles; and further, that said proposition of law was not applicable under section 1972 of Civil Code, vol. I, and made the county liable for the injuries, whether or not, its negligence was the proximate cause thereof. And, further, it eliminated the question as to whether the plaintiff knew and acquiesced in the violation of law in running the automobile at an unlawful rate of speed; further, because said proposition of law was not applicable to a case for damages under section 1972 of Civil Code, vol. I, when the injury was due in part to the negligence of the driver, not because the negligence of the driver is imputed to the passenger, but because the obstruction was not the sole cause of the injury."

These exceptions are overruled.

It does not appear from the case that there was a request to charge as to the question raised as to the responsibility for each other's conduct among those engaged in a common enterprise. It cannot be raised here for the first time.

There is no evidence that Miss Virginia, the plaintiff, was talking to the driver or that she was talking at all, even though she admits that she was having a good time. There was evidence that she was not talking to the driver, and there is no evidence that she was. Surely, a person may have a good time and not talk, even though it is a lady.

It is true that there was a conflict of testimony as to what the driver was doing, but there was no evidence that Miss Virginia was talking to him or interfering with him in any way, or had any right to interfere with the management of the automobile. Her mother was there and she was under

her control, and even if the automobile had been running too fast, it was not the province, nor was it even proper, for a young lady to direct the movements of her mother and older brother.

The doctrine which seems to be maintained by the appellant is that the plaintiff could not recover if the driver was negligent and his negligence contributed to the injury. That is the doctrine of contributory negligence, and contributory negligence is an affirmative defense, which must be pleaded. It was not pleaded here. The contention by the appellant that the injury must be the result solely of the negligence of the county can not be maintained with success, because, where there is an injury which arises from the defect in the highway, the county is liable, unless it appear (1) that the injury was brought about by the plaintiff's own act; or (2) that he negligently contributed thereto. See *Cooper v. Richland County*, 76 S. C. 206, 56 S. E. 958.

These exceptions are overruled.

Exception V. "That his Honor, after reading the statute as to the unlawful speed of automobiles, erred in adding the following: 'Now, that is the law about the driver. But take now, in connection with what I told you in regard to a passenger in an automobile is not imputable to a passenger in the automobile, unless the passenger had the right to control, unless the relation of master and servant existed between them, or the relation of principal and agent existed.' But should have charged instead of the above: 'That if the automobile in which the plaintiff was riding was running at an unlawful rate of speed it was conclusive of negligence, and the plaintiff could not recover, because it was at her own peril that she was riding in an automobile running at an unlawful speed. Especially if she acquiesced therein.' And, further, the charge intimated to the jury that a passenger in an automobile running at an unlawful rate of speed could not be negligent, and that any negligence in that particular could only be attributed to the driver of the machine."

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There was no error in the Judge's charge. If the appellant desired to have the charge, as he says it ought to have been charged, then it was his duty to have so requested.

This exception is overruled.

Exception VI. "That his Honor erred in charging the jury that the negligence of the driver could not be imputed to a passenger as quoted in exceptions 3 and 5 above, when

he should have charged instead: 'Passenger in an automobile can not recover for personal injuries caused from running into an obstruction across a highway if the negligence was due in part to the negligence of the driver, not because the negligence of the driver is imputed to the passenger, but because the obstruction was not the sole cause of the injury.' And, further, he should have charged that, 'A passenger in an automobile running at an unusual rate of speed on a public highway and acquiescing in said unlawfulness and consenting thereto can not claim to be absolutely free from contributory negligence or that she did not in any way bring about the injury by her own act.'"

What is said in regard to exception V applies here. If appellant desired to have the law charged, as he says it ought to have been charged, he ought to have so requested. This exception is overruled.

Exception VII. "That his Honor erred in charging the jury as follows: 'Or, as stated in a particular case—a case I refer to here—the case of *Irvine v. Town of Greenwood*.

And what they say about the duty of a town or a city to keep its streets up would be equally true in regard to the duty of a county, to keep up public roads, because the statutes are very similar (reading to the jury from said decision): 'But we are unable to give to the duty of keeping the streets in repair the narrow meaning contended for by the respondent. To keep a street in repair means to keep it in such physical condition that it will be reasonably safe for street purposes. It is not enough that its surface shall be safe. A street is not in repair when

poles or wires or other structures are so placed in or over it as to be dangerous to those making a proper use of the street.

* * *

“The error being that the case of *Irvine v. Greenwood* was against a city and this is a case against a county; the statutes making cities and towns and counties liable for damages are not ‘very similar.’ The statute as to towns and cities making municipality liable for the mismanagement of anything under their control, while the statute as to counties makes them liable only for damages through a defect in a highway or the negligent repair of a highway or mismanagement in the negligent repair of a highway; and the said charge was equivalent to saying to the jury that if a town or city would have been liable under the same facts, then the county is liable in this case.”

• This exception is overruled.

His Honor was right when he said, in so far as affects this case, the statutes are similar. This is not a suit for mismanagement of “something under control of the county,” but for a defect in the highway.

The judgment appealed from is affirmed.

MR. JUSTICE HYDRICK *concurs in the result.*

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GAMBLE v. METROPOLITAN LIFE INS. CO.

1. APPEAL—CHARGE.—Errors in misstating issues not called to the attention of the Court, and instructions on issues as to which there is no evidence are not considered on appeal.
2. IBID.—EVIDENCE.—Whether the verdict is against the overwhelming preponderance of the testimony is for the Circuit Judge.

Before SEASE, J., York, Fall term, 1912. Affirmed.

Action by James M. Gamble against Metropolitan Life Insurance Company. Defendant appeals.

Messrs. Elliott & Herbert, for appellant, cite: *An instruction inapplicable to any facts in the case and tending to mislead the jury is error*: 66 S. C. 18; 42 S. E. 42; 54 S. E. 110; 53 S. E. 145; 55 S. E. 1; 44 S. C. 548; 64 S. C. 112; 78 S. C. 33.

Messrs. Dunlap & Dunlap, contra, cite: *When knowledge of the agent may be imputed to principal*: 88 S. C. 31; 52 S. C. 224; 79 S. C. 526; 81 S. C. 152. *Defendant is estopped from insisting on forfeiture*: 57 S. C. 358; 63 S. C. 192; 88 S. C. 31; 49 S. C. 454.

July 12, 1913. The opinion of the Court was delivered by

MR. JUSTICE FRASER. This is the second appeal in this case.

The first is reported in 92 S. C. 451.

Appellant's argument contains the following: "This is a suit on a policy of insurance for \$500 on the life of Maggie Gamble, wife of the plaintiff, in which policy the plaintiff is named as the beneficiary. The application is dated February 10, 1910, the policy was dated February 10, 1910, and Maggie Gamble died on 14 June, 1910.

"The answer of the defendant sets up the defense that certain statements made in the application for the policy were untrue; that it was agreed in the application that the answers shall form the basis of the application and if they were not correct and wholly true, the policy of insurance shall be null and void; that in said application insured stated she was in sound health, etc., whereas, she had been afflicted with disease of the kidneys, had been treated for Bright's disease, and had said questions been truthfully answered the policy would not have been issued, etc."

The fourth paragraph is as follows:

(4) "Further answering the said complaint, defendant alleges that said policy of insurance mentioned in the complaint was obtained by fraud, misrepresentation, and deceit, and in consequence of said fraud, misrepresentation, and deceit, the said policy of insurance is null and void."

The case was first tried at the Fall term of the Court of Common Pleas in York county before Hon. R. C. Watts, presiding Judge, who directed a verdict. On appeal this Court reversed the judgment. *Gamble v. Metropolitan Life Insurance Company*, 92 S. C. 451, 75 S. E. 788.

The case was again tried before Hon. T. S. Sease, presiding Judge, at the Fall term, 1912, and the jury rendered a verdict in behalf of plaintiff for the face of the policy and interest.

Defendant appeals on four exceptions, which present two questions. The first three exceptions raise the first point, and the fourth exception raises the second point.

These grounds of appeal are:

1. "That the presiding Judge erred in charging the jury upon the law of waiver by the agent of the defendant company, when there was no such issue made by the pleadings or evidence, and refused, when requested, to charge that there was no evidence of waiver by the agent.

2. "That the presiding Judge erred in not granting a new trial upon the evidence in the whole case, and because of the wrong charged above."

1. The first ground of appeal cannot be considered. The case does not show that his Honor's attention was called to the misstatement of the issues. The case shows the following:

Mr. Herbert: "Your Honor, I will ask that you supplement your charge to the extent of instructing that

1 there is *no evidence* that the agent knew of Mrs. Gamble's condition or varied any stipulation in the contract.

The Court: "I am afraid that would be charging on the facts.

Mr. Herbert: "I just asked for it. I don't know whether it would be competent or not.

The Court: "You will write your verdict on this paper, that blue paper. Take the record."

The difference between no evidence and no issue is great. The rule stated in many cases is that where the presiding Judge misstates the issues the judgment will not be reversed for that reason unless his attention was called to the misstatement of the issues. One reference is sufficient.

Plunkett v. Ins. Co., 80 S. C. 410, 61 S. E. 893: "It will be seen by referring to the case of *Nickles v. Rwy. Co.*, 74 S. C. 102, 136, 54 S. E. 255, that 'Whatever may be the view elsewhere, our cases support the view that an instruction upon an issue as to which there is no evidence whatever or a mistake in stating issues, is not reversible error unless the attention of the Court is called to the matter.' See *Vann v. Howle*, 44 S. C. 546, 22 S. E. 735; *Crosswell v. Association*, 51 S. C. 469, 29 S. E. 236; *State v. Still*, 68 S. C. 38, 46 S. E. 524. This first ground of appeal is overruled."

So, here, this first ground of appeal is overruled.

2. The second ground of appeal must also be overruled. The fourth exception, to which this ground of appeal refers, complains of error in not granting a new trial because the overwhelming preponderance of the evidence was
2 against the verdict. The overwhelming preponderance of the evidence is a question for the Circuit Judge, and this Court can not consider it.

We can not say that there was no evidence. An examination of the deceased by a physician chosen by the insurer is some evidence of one of two things: either that the disease did not exist, or that its existence was known to and waived by the insurer.

The judgment appealed from is affirmed.

MR. JUSTICE HYDRICK *dissents*.

MR. JUSTICE WATTS *disqualified*.

MR. CHIEF JUSTICE GARY *concurring in the result*. One of the provisions in the policy is that "all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties." Therefore, even if the statements contained in the application were not true, this fact alone, was not sufficient to defeat the plaintiff's right of recovery. The burden of proof rested upon the defendant to prove, as alleged by it, that the policy of insurance was obtained by fraud, misrepresentation and deceit, which unquestionably would render it null and void. The testimony upon this question was conflicting, and the case was properly submitted to the jury. Indeed, the defendant's attorneys neither made a motion for a nonsuit nor requested the direction of a verdict. We have stated these facts for the purpose of showing the issues raised by the pleadings.

His Honor the presiding Judge, was not requested to charge, that there was no testimony tending to show waiver. He, however, was requested to charge, that there was no evidence, that the defendant's agent knew of Mrs. Gamble's condition or varied any stipulations in the contract, which is an entirely different proposition and which he could not have charged without invading the province of the jury. The question of waiver was not involved in the case and nothing was said in regard to it that was prejudicial to the rights of the appellant.

For these reasons I concur.

8607

HARVELEY v. SOUTHERN RAILWAY.

PUNITIVE DAMAGES.—A RAILROAD COMPANY is not liable in punitive damages to consignor for collecting from the consignee of a car of logs the cost of putting in sufficient stakes to hold them in position on the car while in transportation.

Before RICE, J., Barnwell, December, 1912. Affirmed.

Action by H. M. Harveley against Southern Railway Company in court of W. R. Brabham. Plaintiff appeals from judgment on Circuit reversing judgment of magistrate court.

Messrs. James M. Patterson and R. P. Searson, Jr., for appellant, cite: What is a rule? 4 Words & Phrases 398; 7 Id. 6271; 25 Fla. 40. Hepburn act requires rates to be published: 208 U. S. 452.

Messrs. Harley & Best, contra, cite: Carriers have the right to adopt reasonable rules: 30 Am. St. R. 170; 56 Id. 326; Moore on Car. 590; 13 Hun. 359; 54 N. Y. 512; 28 Barb. 275; 22 Barb. 130; 42 N. Y. Sp. Ct. 128; 11 Metc. 121; 65 Md. 120.

July 12, 1913. The opinion of the Court was delivered by

MR. JUSTICE FRASER. The appellant states his case as follows: "This action was commenced in the court of W. R. Brabham, Esq., magistrate, on summons duly served and demanding damages of one hundred dollars against the defendant-respondent for actual and punitive damages, for wilfully, knowingly, maliciously and unlawfully extorting from him more than a fair and reasonable toll or compensation for the transportation of one car of logs from Barnwell, S. C., to Sumter, S. C." Upon the trial of said case the jury

found a verdict for plaintiff in the sum of fifty dollars, from which an appeal was duly had to the Circuit Court, which resulted in the appeal being sustained and the complaint dismissed by the following order: "It appears that the 75c charged by the defendant for restaking car No. 51515 was charged in accordance with a just and reasonable rule of defendant company, and there being no evidence to support punitive damage it is ordered that the complaint be, and the same is hereby, dismissed with costs;" "from which said judgment the appellant has brought this appeal upon four exceptions, which are duly set out in the case."

It will not be necessary to consider the exceptions separately, because under no view of the case could a judgment for the plaintiff be sustained. The seventy-five cents charged was not a "toll or compensation for the transportation." The charge was for restaking, and not for transportation.

The first connection of the defendant with this case, is, when the plaintiff, who is engaged in shipping logs from various places, presents himself to the agent of the defendant at Barnwell, S. C., and gets a bill of lading for a carload of logs that were at Ashley, about three miles away. When the car got to Branchville, it was inspected by the inspector of the defendant and condemned as unfit for transportation because there were not stakes enough to hold the logs in place on the car during transit to its destination. The agent at Branchville had additional stakes put in at a cost of seventy-five cents. This cost of restaking was demanded at Sumter, the point of destination, from the consignee before the logs were delivered. After some delay and some demurrage, which was paid, the shipment was delivered and this action was brought for actual and punitive damages. There is no direct evidence as to who loaded the logs or whose business it was to make them secure. That logs shipped on an open car must be made secure is too manifest to be questioned, and is not questioned. There is not a word to show

that the rules are unreasonable. There is no evidence to show that the logs were securely placed upon the car. There was testimony to show that the restaking was necessary, and it was uncontradicted. There was no evidence to show that it was the duty of the defendant to stake or restake the logs and in order to recover damages on the contract there must appear to have been a failure on the part of the defendant to perform some duty. There was evidence of some delay and some expense at Sumter, but there was no evidence of the length of the delay at Sumter or the loss occasioned by it, and no evidence of the expense. There was no evidence that there was any default on the part of the defendant, or any loss for which it was responsible.

The judgment appealed from is affirmed.

8608

KEELS v. CITY OF SUMTER.

LARCENY—JURISDICTION.—THE CITY RECORDER of the city of Sumter has no jurisdiction to try and sentence one for petit larceny.

Proceeding in *habeas corpus* before Mr. Justice Fraser, Sumter. Affirmed. The order of Mr. Justice Fraser appealed from by the City of Sumter is:

"This is a proceeding in *habeas corpus*. The defendant was convicted by the recorder of the city of Sumter upon six charges of petit larceny and sentenced to thirty days for each offense. There was included in the indictment a charge of carrying concealed weapons. The defendant was also convicted of this offense. The alternative was given in each case of paying a fine. The defendant paid the fine for carrying concealed weapons. The city of Sumter has an ordinance against carrying concealed weapons, but none against larceny. The prisoner raises the question of jurisdiction of the recorder to try offenses other than

violations of the ordinances of the city. It is conceded that Sumter is a city of more than two thousand inhabitants and less than twenty thousand inhabitants. I hold that the recorder of the city of Sumter has no jurisdiction to try prisoners for offenses other than offenses against the ordinances of the city of Sumter. It is, therefore, ordered that the defendant, Jno. Keels, be discharged from custody under the commitment by the recorder of Sumter and that unless he be held under some other authority he be discharged from custody and allowed to go hence without day."

Messrs. Lee & Moise, for appellant.

Messrs. H. D. Moise and H. S. Merriman, contra.

July 12, 1913. The opinion of the Court was delivered by

MR. JUSTICE WATTS. The agreed statement of facts in this case shows that John Keels was tried by the recorder of the city of Sumter in 1913, on six charges of petit larceny and convicted on all the charges and sentenced to thirty days' imprisonment on the county chain gang for the county of Sumter, or pay a fine of one hundred dollars in each case.

Keels having been committed to the county chain gang a petition for a writ of *habeas corpus*, in the usual form, was taken before Justice Fraser, based upon the lack of jurisdiction of the recorder of the city of Sumter, to try and punish the defendant (respondent here) for petit larceny, upon the ground, that the city of Sumter had no ordinance prohibiting the same, and that the recorder's powers extended only to the punishment of offenses against the ordinances of the said city of Sumter. Justice Fraser issued the writ and heard the case, and sustained the contention of Keels, and ordered his discharge from custody. This order of Justice Fraser should be set out in the report of the case. From this order the city of Sumter appeals, and the exceptions practically

raise but one point: Did his Honor, Justice Fraser, err in holding that the recorder of the city of Sumter was without power, or authority to try or convict the defendant for a criminal offense, contrary to the criminal statutes of the State of South Carolina then in force, but only had jurisdiction to try and convict for offenses contrary to the ordinances of the city of Sumter?

Under the facts of the case, we have no hesitation in saying the exceptions should be overruled, and judgment affirmed.

The case of the *City of Anderson v. Seligman*, 85 S. C. 16, 67 S. E. 13, is conclusive, and controls this case. On page 18 of that case, Justice (now Chief Justice) Gary, uses the following language: "When section 2003 of the Code of Laws conferred upon mayors the powers and authority of magistrates in criminal cases, within the corporate limits and police jurisdiction of their respective cities, it was merely intended to give to the mayors the same power to try persons charged with the violation of an ordinance that a magistrate had to try a person charged with the violation of a statute, or other law of the State in cases, where the punishment did not exceed a fine of one hundred dollars, or imprisonment for thirty days. A violation of the provisions of an ordinance of a city, and a violation of the statute, of the State are two separate and distinct offenses."

Judgment affirmed.

MR. JUSTICE FRASER *disqualified*.

8609

BATSON v. GREENVILLE & KNOXVILLE RY. CO.

1. RAILROADS—CROSSINGS—NEGLIGENCE.—In this case the charge was as explicit as the Court should have made it on the doctrine that failure to observe due care at a dangerous crossing at a time when the traveler had knowledge or ought to have known that a train was approaching, is gross negligence.
2. ISSUES.—A party may withdraw an abandonment of issues if it is done at a time that the other party could not be prejudiced thereby.
3. RAILROADS—CROSSINGS—NEGLIGENCE—ISSUES.—Whether a failure to give a crossing signal at a dangerous crossing is wilful or inadvertent is for the jury.

Before DEVORE, J., Greenville, November term, 1912.
Affirmed.

Action by W. Y. Batson, administrator of J. Asa Batson, against the Greenville & Knoxville Railway Company. Defendant appeals.

Messrs. O. K. Mauldin and Haynsworth & Haynsworth, for appellant. *Mr. Mauldin cites: Carelessly driving on a public crossing is gross negligence: 86 S. C. 385; 76 S. C. 379; 94 S. C. 143.*

Messrs. McCullough, Martin & Blythe, contra, cite: *Judge should not state what things make negligence: 51 S. C. 453; 53 S. C. 448; 61 S. C. 556. There was evidence sufficient to carry issue of wilfulness to jury: 82 S. C. 327; 90 S. C. 266; 85 S. C. 25.*

July 14, 1913. The opinion of the Court was delivered by

MR. JUSTICE FRASER. This is an action for the killing of plaintiff's intestate at the crossing of a public highway and the railroad.

All the exceptions refer to the charge of the presiding Judge and the facts upon which the suit is based need not be set out.

The first and second exceptions are as follows:

1. "His Honor erred in not charging the third request submitted: 'If a person carelessly drives upon a railway crossing in front of an approaching train, by the exercise of slight care, he could and would have known that the train was approaching, and that it was dangerous

1 to attempt to cross, then such person may be said to have been guilty of gross negligence; because failure to exercise slight care is gross negligence, and, in such case, the party could not recover even though the railway company had negligently failed to ring the bell or blow the whistle.'

"It is submitted that no part of the charge as given clearly presented to the jury the proposition of law that a person who drives upon a railroad crossing, who knows or ought to know that it is dangerous to attempt to cross at that moment, is guilty of gross negligence.

2. "He erred in not charging defendant's seventh request as submitted, to wit: 'If one about to cross a railroad track fails to take slight care to ascertain whether the train is approaching or whether there is any danger in attempting to cross the railroad track, this would constitute gross negligence, and if this operated as the proximate cause of his injury, he could not recover even though the railway company had failed to blow the whistle or ring the bell.'

"It is submitted that this request correctly stated a proposition of law applicable to the case, not covered by the charge as given, and which was not on the facts."

His Honor charged the jury as follows:

2. "Then and under such circumstances it is his duty then to look out for himself, to use reasonable care for the purpose of protecting himself and for his own safety.' The balance of that request, I think, is on the facts and I will not charge it.

"That request means this, gentlemen, in sum and substance: As I have already explained to you, that while it is

the duty of the railroad company to blow the whistle and ring the bell, as I have explained to you, yet if a person has notice in some other way that the train is approaching and he knows it is approaching the crossing, then he must use that degree of care and caution that a person of ordinary care and prudence would have used under the same or similar circumstances and look out for himself. He cannot be guilty of gross negligence under such circumstances. And if he knew on that occasion, if he knew that the train was coming, if he knew it in any other way other than by the blowing of the whistle or the ringing of the bell, and he failed to observe such care and caution and prudence under those circumstances as a person of ordinary reason and prudence and care would have done, and his failure to do that contributed to his own death, as a direct and proximate cause thereby, he could not recover, unless you conclude that the act of the defendant was wilful and reckless, or that the defendant was guilty of a conscious failure to perform a duty imposed by law.

3. "Then it is for you to say whether such person was guilty of gross negligence or not.' I charge it that way. 'The failure to exercise slight care is gross negligence.' I charge you that.

" 'Provided his failure to exercise slight care contributed as a direct and proximate cause of his death or injury.' I charge you that with that addition."

His Honor charged all it was proper for him to charge.

2. The third exception is: 3. "He erred in not charging defendant's ninth request as submitted, to wit: 'The plaintiff having in open Court withdrawn all charges of common law negligence, and announced that the only charge

2 of negligence upon which he relies is the claim that the railway company failed to give the crossing signals as required by statute, I therefore charge that unless you are satisfied by the preponderance of the evidence that the railway company did, in fact, fail to give the crossing

signals by blowing the whistle or ringing the bell as required by statute, your verdict must, in that case, be for the railway company.' It is submitted that this request correctly stated a proposition of law applicable to the case which was not covered by the charge."

It is true that the plaintiff's attorney did say just before the charge began that the allegations as to common law negligence were withdrawn, but just after the charge began, his Honor asked for the issues and stated them as follows:

Court: "In other words, the claim as it stands now is, that the first act was done recklessly and wilfully, the second was done recklessly and wilfully, the third was done recklessly and wilfully, and the fourth was done negligently, recklessly and wilfully.

Mr. Blythe: "That's correct, sir."

There were four specifications of negligence in the complaint. They were all included in the statement. Plaintiff had the right to withdraw the withdrawal unless something had been done or omitted that prejudiced the defendant. If the defendant had failed to introduce any evidence or omitted any argument on account of plaintiff's statement, it would have been different. It seems from the case, that both statements were made after evidence and argument had closed. No prejudice has been shown and this exception is overruled.

Exception four: 4. "He erred in not charging defendant's eleventh request as submitted, to wit: 'I charge you further that there is no evidence in this case to carry the question of wilfulness or wantonness to the jury.

3 This question, therefore, is withdrawn and you need not consider that charge in the complaint.' It is submitted that there was no evidence of a wilful, wanton or reckless failure to give the statutory signals; the evidence at most, only being open to the inference of ordinary negligence."

The facts were before the jury and it was their province to say whether there was a failure to give signals of the approach of the train and if there was a failure, whether it was mere inadvertence or wilful and wanton disregard of duty. The appellant thinks that crossing was so dangerous that the respondent should have been very careful in approaching it. The natural obligation was mutual and the statute has added the giving of signals to the appellant. Unfortunately there is no law in this country to prevent a death trap like this, where the public highway and a railroad cross each other and both are in cuts. It is no part of the duty of the Courts to make law. It is the province of the Courts to enforce the law and the province of the jury to say whether it is wilful and reckless disregard of duty to fail (if it did fail) to give the warning required by law, at a dangerous place.

The judgment is affirmed.

8610

BEYLOT v. ATLANTIC COAST LINE R. R. CO.

RELIEF DEPARTMENT—CONTRACTS—FORFEITURE.—Under section 2808 of Code 1912, the representatives of a beneficiary of a relief department of a railroad company may recover the amount of the relief benefit, after suing for, recovering and collecting judgment for his death, although the contract provides that suit on the injury shall invalidate the contract. *Sturgiss v. R. R. Co.*, 80 S. C. 167, *distinguished from this case.*

Before FRANK B. GARY, J., Charleston, May, 1912.
Reversed.

Action by Caroline M. Beylot against Atlantic Coast Line R. R. Co. The Circuit decree appealed from is:

Rep.]

April Term, 1913.

"Briefly stated, this is an action in which the plaintiff seeks to recover an amount alleged to be due her by reason of the fact that her son, Marion J. Beylot, was killed while he was a member of the relief fund of the relief department of the Atlantic Coast Line Railroad Company, she being the beneficiary.

"The answer of the defendant states substantially that the said Marion J. Beylot was a member of said relief fund; was in the employ of the defendant and was killed while so employed. The answer sets forth the terms of the contract entered into when the said Marion J. Beylot became a member of the relief fund, one of the provisions being that if an action on account of injuries to or death of the said Marion J. Beylot should be instituted against the defendant to recover damages by the said Beylot or his representatives, benefits from the relief fund would be waived and released to the defendant. The answer further states that the plaintiff herein has, as administratrix of her son, instituted a suit against the defendant for her benefit; that she recovered judgment in said suit for ten thousand (\$10,000.00) dollars, on account of the negligent killing of the said Marion J. Beylot by the defendant; and, that the said judgment with interest and cost was paid in full by this defendant on the 7th day of January, 1911, and a release in full executed therefor. The answer then invokes the terms of the contract as a defense to this action. The plaintiff demurs to the answer as not constituting a defense.

"Whether or not the answer constitutes a defense to the action is the sole question presented for my determination. I am referred to the case of *Sturgiss v. Atlantic Coast Line Railroad*, 80 S. C., and to the case of *Miller v. Atlantic Coast Line Railroad Company*, 90 S. C., as conclusively showing that the answer does not constitute a defense to this action. A careful study of the points decided by the two cases leads me inevitably to the conclusion that the

demurrer should not be sustained. It seems to me that it is no longer an open question. In the Sturgiss case the Court was evenly divided as to whether or not the act of the legislature limiting the effects of contracts such as the one above referred to is constitutional, and, of course, that question was left unsettled by that case. Subsequently the Miller case upheld the constitutionality of the act, and decided that it was a valid exercise of the police power of the State. The Miller case went no further than to settle what was left unsettled by the Sturgiss case. But in the Sturgiss case the Court was unanimously of the opinion, 'that the statute does not provide that a receipt or release given in satisfaction of a claim arising out of negligence shall be null and void and that even after full compensation for negligent injuries, the employee shall still have the right to recover his beneficial interest in the hospital fund, although he had previously relinquished it,' or as another of the Justices expresses it, 'the statute goes on to provide that the acceptance of benefits shall not estop from recovering damages for negligent injuries or death, and declared void any contract to the contrary, and any receipt or release given in consideration of such benefits, *but it nowhere declared that a member after full compensation for the negligent injury is still entitled to recover of the same defendant the benefits which he agreed to waive by accepting compensation in such other mode.*' The Miller case in no wise conflicts with this unanimous finding in the Sturgiss case.

"If, then, the statute is silent as to the effect of having brought suit against the same defendant for damages, parties would be governed by the terms of the original contract. Without some legislative limitation of this part of the contract, which as we have shown, does not exist, this part of the contract is binding upon the parties to it. *Johnson v. Railroad Co.*, 55 S. C. 152.

Rep.]

April Term, 1918.

"It is therefore ordered: That the demurrer be, and the same is hereby, overruled."

Plaintiff appeals.

Messrs. Logan & Grace, for appellant, cite: *The statute controls*: 219 U. S. 549; 90 S. C. 249.

Mr. W. Huger FitzSimons, contra.

July 14, 1913. The opinion of the Court was delivered by

MR. JUSTICE FRASER. The respondent thus states this case:

"This action was commenced on the 15th day of July, 1911. The suit is by the beneficiary named in the contract of Marion J. Beylot, deceased, who was a member of the Atlantic Coast Line Railroad Company Relief Department, and is brought to recover two hundred and fifty (\$250.00) dollars death benefits under said contract. Marion J. Beylot was an employee in the service of the Atlantic Coast Line Railroad Company, and as such, became a member of said relief department and was killed on the 19th day of January, 1910, while in the service of that company and a member of said relief department. The complaint alleges these facts. The answer alleges that Caroline M. Beylot, the plaintiff herein, as the administratrix of the said Marion J. Beylot, brought a suit against the Atlantic Coast Line Railroad Company for the death of said Marion J. Beylot, and a judgment therein rendered in November, 1910, which judgment was paid in full January 7, 1911, and release in full executed therefor. This suit was for the sole benefit of the plaintiff, Carolina M. Beylot, as the mother of Marion J. Beylot. The answer also alleges the nature and organization of the relief department, its regulations and the nature of the contract of a member of such department.

It also alleges by the terms of said contract it was provided:

"If any suit should be brought against said Atlantic Coast Line Railroad Company for damages arising from or growing out of injury or death occurring to him, the benefits otherwise payable and all obligations of said relief department created by his membership therein should thereupon be forfeited without any declaration or other act by said relief department or said Atlantic Coast Line Railroad Company.'

"The answer further alleges that the bringing of said suit for damages for the death of said Marion J. Beylot and the recovery and payment of the judgment therein, forfeited all obligations for payment of benefits by defendant to plaintiff under the terms of the contract, and operated as a release and discharge of defendant from any and all claims by reason of the death of Marion J. Beylot or by reason of his membership in said relief department.

"Plaintiff demurred to the answer, alleging the facts therein stated did not constitute a defense, for the reason that the judgment in the suit for damages constituted no defense to this suit for benefits under the relief department contract.

"The case came on for trial upon the pleadings before Judge Frank B. Gary at the April term, 1912. The Circuit Judge overruled the demurrer, holding that the forfeiture clause of the contract was binding and the facts stated in the answer would constitute a defense by an order made May 8, 1912.

"From that order this appeal is taken.

"The only question, therefore, raised by this appeal is whether a member of such a relief department, or his beneficiary, can maintain an action upon such a contract for benefits thereunder after a suit for damages has been prosecuted and recovered upon for the very injury for which the benefits are claimed."

The respondent relies upon *Sturgiss v. R. R. Co.*, 80 S. C. 167, 61 S. E. 261, to sustain the order overruling the demurrer. The difference between that case and this is that in the *Sturgiss* case the statement of facts contains the following, at pages 190-199:

"That as a result of said action, the plaintiff succeeded in recovering from the defendant the sum of twenty-seven hundred (\$2,700.00) dollars for the alleged injuries sustained and the same was paid to the plaintiff by the defendant and a *full and complete release and discharge was taken for all claim and demand against the said defendant for said injuries.*"

In this case there is no such allegation. Forfeiture was alleged and release by operation of the original contract. Mr. Justice Gary (now Chief Justice) and Chief Justice Pope, who concurred with him, did not hold as respondent claims. They set forth in that opinion the well established doctrine that there is a difference between a contract to release or limit liability for damages from future negligence and a settlement for past acts of negligence. The one is forbidden by the law and the other favored.

The appellant claims that in the *Miller* case, 90 S. C. 249, the plaintiff was allowed to take relief money and then bring suit, and claims that there is no logical difference between that case and the one in which an employee brings suit and then claims the relief money. There is no logical difference, but that is not the question. Our cases hold that the question must be decided by the statute and there is no power in the Courts to so amend the statutes as to make them conform to the Court's ideas of logic.

The statute is as follows: Code of Laws of South Carolina, vol. I, sec. 2808: "Receipt of Relief Fund no Bar to Action for Damages.—When any corporation, firm or individual runs or operates what is usually called a relief department for its employees, the members of which are required or permitted to pay dues, fees, money or other compensa-

tion, by whatever name called, to be entitled to the benefit thereof, upon the death or injury of the employee, a member of such relief department, such corporation, firm or individual, so running or operating the same is required to pay to the person entitled to the same the amount it was agreed the employee, his heirs or other beneficiary under such contract should receive from such relief department; the acceptance of which amount shall not operate to estop, or in any way bar the right of such employee or his personal representative from recovering damages of such corporation, firm or individual, for personal injury or death caused by the negligence of such corporation, firm or individual, their servants or agents, as are now provided by law; and any contract or agreement to the contrary, or any receipt or release given in consideration of the payment of such sum, is and shall be null and void."

It will be observed that in the first part of the section there is an absolute requirement, that corporations, firm or individuals shall pay according to the contract. This absolute requirement is not limited by any other part of the statute. On the contrary, it provides that acceptance of benefits shall not operate as an estoppel and also, that a release given, in pursuance of the contract, shall be void.

If the legislature had intended to make the action for damages operate as a release, it must say so in the act. The act does not say so and this Court has no right to amend the act by saying that a suit for damages shall operate as a release.

The judgment is reversed.

THE CHIEF JUSTICE *dissents for the reasons stated in the decree of his Honor, the Circuit Judge.*

8611

BROWN & PARLER v. KOLB.

APPEAL COSTS.—Where in claim and delivery a verdict is found for possession of the property and a special finding that defendant owed plaintiff a certain amount, and upon appeal by defendant that amount is reduced more than ten dollars, he is entitled to appeal costs.

Before ERNEST GARY, J., Sumter, April, 1913.
Reversed.

Action by Brown & Parler against J. K. Kolb in magistrate court. From Circuit order fixing appeal costs, defendant appeals.

Mr. A. B. Stuckey, for appellant, cites: 79 S. C. 388; 41 S. C. 206; 44 S. C. 376.

Messrs. L. D. Jennings and R. D. Epps, contra, cite: 44 S. C. 376; 79 S. C. 388; 43 S. C. 262; 38 S. C. 158; 93 S. C. 316.

July 14, 1913. The opinion of the Court was delivered by

MR. JUSTICE FRASER. The respondent's statement of this case is as follows :

"This is an appeal from the order of his Honor, Judge Ernest Gary, in the above stated case, taxing the costs upon appeal against the defendant, who was the appellant upon the first appeal. This was an action in claim and delivery, brought in the court of magistrate. Before the case was submitted to the jury, the attorney for the defendant asked that a special verdict be also rendered by the jury, fixing the amount due to the plaintiffs by the defendant. In response to this request, the verdict of the jury was as follows:

“We find for the plaintiffs the right to the possession of the property in dispute, or the value thereof, to wit, the sum of one hundred dollars, in case the return thereof cannot be had. We find the defendant is due the plaintiff the sum of one hundred dollars. Eugene E. Aycock, Foreman.’

“From the judgment entered on this verdict, the defendant appealed to the Supreme Court upon nine exceptions, asking for a new trial upon four grounds. Upon said appeal, the Supreme Court refused the new trial and affirmed the verdict below with the exception of the special finding of the jury, which was reduced in amount from one hundred dollars to seventy-seven and 55-100 dollars. Thereupon, the plaintiffs gave notice of a motion to tax the appeal costs, and the defendant gave a like notice. When the motion came on to be heard by the clerk of the Circuit Court, the said clerk taxed the costs in favor of the defendant and against the plaintiffs. The plaintiffs thereupon moved his Honor, Judge Ernest Gary, to correct said taxation, and to tax the costs in favor of the plaintiffs. When this motion was heard by his Honor, the Circuit Judge, his Honor passed an order correcting the said taxation, and ordered that the said costs be taxed in favor of the plaintiffs against the defendant. From this order the defendant now appeals.”

Costs are purely statutory. The statute provides as follows, Code 1912, vol. II (Civil Procedure), sec. 412: * * * “if such offer be not made (none was made here) and the judgment in the appellate court be more favorable to the appellant than the judgment of the Court below, or, if such offer be made and not accepted and the judgment in the appellate court be more favorable to the appellant than the offer of the respondent, the appellant shall recover costs: *Provided, however,* That the appellant shall not recover costs unless the judgment appealed from shall be reversed on such appeal or be made more favorable to him to the amount of at least ten dollars.”

The judgment was made more favorable to the appellant herein to the amount of twenty-two dollars and forty-five cents, and the statute says the appellant shall recover costs.

The judgment appealed from is reversed.

MR. JUSTICE HYDRICK *concurs in the result.*

8583

KLATTE v. McKEAND.

1. SERVICE OF SUMMONS—JUDGMENT—WAIVER.—There being evidence here that the party served as agent of the corporation intended to be served was in fact not such agent, and no evidence to the contrary, the service and judgment by default were properly set aside and vacated. Request by defendant of extension of time to answer is not a waiver of no service.
2. EXCUSABLE NEGLECT.—Where a motion is made to set aside service of summons and to vacate judgment by default on ground of excusable neglect, the Court should find that judgment was obtained through excusable neglect of defendant, where it sets aside the service.

Before COPES, J., Dorchester, September, 1912.
Affirmed.

Action by C. U. Klatte against A. W. McKeand and Coastal Land and Development Co. Plaintiff appeals.

Messrs. J. Waties Waring and W. A. Holman, for appellant. *Mr. Holman* cites: 76 S. C. 180; 94 S. C. 54; 84 S. C. 343; 87 S. C. 101; 93 S. C. 487.

Mr. M. Rutledge Rivers, contra, cites: 87 S. C. 402; 73 S. C. 528; 91 S. C. 429; 77 S. E. 710; 64 S. C. 343; 82 S. C. 505; 84 S. C. 145; 62 S. C. 533; 86 S. C. 324; 76 S. C.

180; 90 S. C. 552; 76 S. E. 1096; 60 S. E. 362; 61 S. E. 35; 60 S. E. 870; 63 S. E. 790; 69 S. E. 738; 73 S. E. 222; 49 S. E. 1007; 92 S. C. 415; 28 S. C. 313; 25 S. C. 380; 78 S. C. 325. *As to jurisdiction of person:* 28 S. C. 313; 25 S. C. 380; 78 S. C. 325; 87 S. C. 323, 101; 6 Ind. 268; 65 Kan. 830; 72 Kan. 73; 48 A. 741; 20 Ency. P. & P. 407; 3 Am. & Eng. Ann. Cas. 726; 72 S. E. 245; 69 S. E. 762.

June 28, 1913. The opinion of the Court was delivered by

MR. JUSTICE FRASER. The appeal in this case is from an order setting aside a judgment by default. The order was made by his Honor, Judge Copes, and was granted on the ground that the respondent, Coastal Land Development Company, was not served with summons. The order also set aside the judgment as a matter of discretion for excusable neglect.

There are seven exceptions, but the appellant reduces the questions to three as follows:

1. Did his Honor err in holding and finding that there had been no service on the defendant, Coastal Land Development Company?

The answer to that question is, he did not. There was abundant evidence that H. M. Sanders, who was served as the agent of the company, was not such agent and there was no evidence that he was the agent. There was nothing

1 ing that his Honor could do but to so hold, and as a consequence thereof set aside the judgment by default. The appellant claims, however, that inasmuch as the attorneys for the defendant company asked of the attorneys for the plaintiff additional time to answer, it thereby appeared in the cause and waived service. The recent case of *Williams v. Hatcher*, *infra* 49, holds that even a notice of a motion (not made), is not a waiver.

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2. Did his Honor err in holding that the judgment by default against the Coastal Land Development Company should be vacated and set aside on the ground of excusable neglect and surprise?

This Court having held that there was no service on the defendant, this question does not arise. It was proper for

Judge Copes to consider both grounds because, if this Court had held that he was in error in setting aside the service of the summons, then the question of discretion would have arisen. The holding, however, that there was no service eliminated all other questions.

3. Did the Court of Common Pleas for Dorchester county have jurisdiction to render a judgment against the defendants?

No Court had jurisdiction to render judgment against the appellant as it was not served. The defendant, McKeand, has not appealed and his rights are not before this Court.

The respondent, Coastal Land Development Company, asked to sustain the order on additional grounds.

It would not be proper to consider these questions. They have become purely academic.

The judgment appealed from is affirmed.

8612

HURST v. CRAIG FURNITURE CO.

1. CHARGE—WORDS AND PHRASES—ISSUES.—Where the evidence as to what the word “awning” means is conflicting, it would be a charge on the facts for the Judge to instruct that it included the frame and attachments because both are included under that term in the stock list.
2. TRADE FIXTURES—ISSUES.—Whether an attachment to a building by a tenant for purposes of trade is to be regarded as a trade fixture is a mixed question of law and fact and depends on the intention of the parties.

Exceptions.	[95 S. C.]
3. IBID.—WILFULNESS. —An outgoing tenant may be liable in punitive damages for removing fixtures put on a building while he occupied it for trading purposes.	
4. IBID.—IBID. —Where an outgoing tenant attempts to remove his trade sign from a building by a reckless use of paint, the jury may infer he did it wilfully.	
5. APPEAL. —Where the record does not show the Judge was requested to instruct that there was no evidence to sustain an allegation in the complaint, his failure to do so should not be made the basis of an exception.	

Before SPAIN, J., Sumter, November, 1912. Affirmed.

Action by Fannie E. Hurst against J. D. Craig Furniture Company, R. F. Haynsworth and W. C. Wise. Defendants appeal on the following exceptions:

1. "Because his Honor erred, it is respectfully submitted, in excluding the testimony of R. F. Haynsworth, one of the defendants, as to a conversation had between him and J. D. Craig from whom R. F. Haynsworth purchased a one-half interest in said business, as to the fixtures involved in this suit, on the ground that the said testimony was incompetent under section 400 of the Code, whereas, his Honor should have allowed the defendant and witness, R. F. Haynsworth, to testify as to the conversation with J. D. Craig as the same was competent under section 400 of the Code, and relevant to the issues in this case, and said testimony was material, and probably would have changed the result of the said case.

2. "Because his Honor erred, it is respectfully submitted, in refusing to allow the defendant and witness, R. F. Haynsworth, to answer the question, ruling that the same was incompetent under section 400 of the Code, as follows: 'Q. At the time you purchased it, did he represent these fixtures as being a part of the business?' The error being that J. D. Craig, owning the business out of which this suit arose, sold a one-half interest to this witness and his repre-

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sentations at such time were material to this cause, and the plaintiff having gone into said conversation, and having been examined in regard to said transaction or communication, and evidence as to the same having been given on the trial in behalf of the plaintiff, that then the testimony was competent under section 400 of the Code, and the witness should have been allowed to answer the same, and if the answer had been allowed the same would probably have changed the result of this trial.

3. "That his Honor erred, it is respectfully submitted, in refusing to allow R. F. Haynsworth, one of the defendants and witness, to testify as to any conversation with J. D. Craig concerning his purchase of one-half interest in the business from the said J. D. Craig out of which this suit arose, and holding that all such conversation was incompetent under section 400 of the Code, whereas, his Honor should have allowed the witness, R. F. Haynsworth, to testify as to the said conversation, transaction and agreement with the said J. D. Craig, the plaintiff having gone into the same, testified as to said conversation and transaction, and testimony having been offered on behalf of the plaintiff as to such conversation or transaction, and therefore the witness should have been allowed to testify as to the same.

4. "Because his Honor erred, it is respectfully submitted, in charging the jury as follows: 'Now, as to that awning, that is a question of fact for you to determine whether the word "awning" includes the frame and the covering, or just the covering.' The error being that his Honor should have charged the jury that the word 'awning' as used in stock taking included the frame, and the stock taking being in writing, it was the duty of the Court to construe the same.

5. "Because his Honor erred, it is respectfully submitted, in not charging the jury that all of the chattel property referred to in the complaint were trade fixtures, and as such were removable by the tenant within the term of his lease.

6. "Because his Honor erred, it is respectfully submitted, in leaving to the jury the determination of the class of property referred to in the complaint, but should have held that the same were trade fixtures, which, under the evidence, were removable by the tenant at any time within the term of his lease, and therefore the tenant was not liable for removing the same.

7. "Because his Honor erred, it is respectfully submitted, in charging the jury as follows: 'Now, you must take into consideration, what was the intention—what was the intention of the parties? Did they intend when they—these fixtures were fixed to the realty, to use them for the purpose of carrying on their trade, or was it for the purpose of becoming a convenience to the land? * * * Now, that is a question of fact for you to determine, whether these are fixtures under the law as I charge you, or whether they are not fixtures.' The error being that his Honor should have charged the jury that all of this property were trade fixtures, removal by the tenant during the term of his lease.

8. "Because his Honor erred, it is respectfully submitted, in not directing a verdict for the defendants, on the ground that all of the chattels were from their nature trade fixtures, removable by the tenant who put them in within the term of the lease.

9. "Because his Honor erred, it is respectfully submitted, in not directing a verdict except as to the actual value of the awning frames, there being no testimony that any of the property was other than trade fixtures put into the building by the tenant for the purpose of its business, and therefore removable by it during the term, and therefore defendants could not be held liable for the value of the fixtures, same being the property of the defendant, J. D. Craig Furniture Company, and they having the right under the law of this State to remove the same.

10. "Because his Honor erred, it is respectfully submitted, in not directing a verdict as to punitive damages, there

being no evidence sufficient to sustain an action for punitive damages, the defendants merely having removed certain trade fixtures belonging to it without in any way damaging or injuring the property of the plaintiff, and therefore there was no testimony on which to base punitive damages in this action.

11. "Because his Honor erred, it is respectfully submitted, in not granting a new trial on the ground that the chattels out of which this action arose were from their nature trade fixtures and removable by the tenant who put them in during the term.

12. "Because his Honor erred, it is respectfully submitted, in not setting aside the verdict and granting a new trial on the ground that there was no testimony to sustain punitive damages, and no testimony to sustain any actual damages, the property being removed being the property of the defendant, J. D. Craig Furniture Company.

13. "Because his Honor erred, it is respectfully submitted, in not directing a verdict as to the allegation as to painting out the sign of the defendant, J. D. Craig Furniture Company, from the outside of the store building of the plaintiff, as the same was a trade fixture and removable by the tenant during the term, and the tenant had a right to obliterate its trade name so painted on the store building.

14. "Because his Honor erred, it is respectfully submitted, in not granting a new trial on the ground that there was no testimony showing that the defendants were in any way liable for the painting out of the sign on the outside of the store building, as the sign was a trade name of the J. D. Craig Furniture Company, and the sign, after being placed upon the said building, became a trade fixture and removable by the tenant during its term, and the mere attempt to remove the same was no ground upon which to base a cause of action.

15. "Because his Honor erred, it is respectfully submitted, in allowing the jury to consider the question of the

stable door or gate, the error being that the evidence having shown that the gate or door of the stable had fallen from its support by reason of the natural wear and tear of its use, that then these defendants were not liable for the same having fallen off the hinges, and therefore there was nothing actionable in the gate having fallen off its hinges from ordinary use, wear and tear."

Messrs. Lee & Moise, for appellants, cite: *Tenant has right to remove trade fixtures*: 7 L. Ed. 138; 35 Id. 1055; 52 S. C. 619; 44 S. C. L. 135; 15 S. C. 67; 51 S. C. 28; 31 S. C. 274; 15 L. R. A. 462.

Mr. L. D. Jennings, contra, cites: *As to fixtures*: 1 Bail. 540; 3 Hill 613; 51 S. C. 29.

July 14, 1913. The opinion of the Court was delivered by

MR. CHIEF JUSTICE GARY. The following statement appears in the record:

"This action was commenced by the service of the summons and complaint on the 12th day of February, 1912.

"The plaintiff was the owner of a store building in Sumter, S. C., and same had been rented to the J. D. Craig Furniture Company, the term expiring December 31, 1911.

"During the tenancy J. D. Craig Furniture Company had placed within said store building for its own use, some electric light wiring upon the wall and ceiling, and had painted its firm name and sign, on the upper southern corner of the outside of the southern wall of the store building. The plaintiff also claimed to own the awning frame in front of the store, horse trough in the yard, and two shop drawers.

"The plaintiff on the trial admitted that the defendant, J. D. Craig Furniture Company, had placed the electric wiring in the store, but claimed that same belonged to her, and also the other property mentioned.

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"Before the end of the tenancy, the defendant, J. D. Craig Furniture Company, removed the awning frame, electric wiring and horse trough, and attempted to paint out the sign of this defendant on the outside of the store building. They were prevented from painting out the sign, by the act of the plaintiff and her agent. The defendant denied having taken the shop drawers, and stated they knew nothing about them.

"This action was brought to recover \$10,000 actual and punitive damages for the removal of the awning frame, electric wiring, shop drawers, and horse trough, and tearing down of the stable door, and for painting out the sign on the outside of the building, and alleged misconduct of defendants in removing same.

"The defendant, J. D. Craig Furniture Company, claimed it had a right to remove this property, on the ground that the same belonged to it, except the shop drawers, which they knew nothing about, and they also claimed that they had a right to paint out the sign, on the outside of the building, as it was their corporate name and business sign, and it was put up merely for the purpose of advertising. The defendants claimed that the articles removed were merely trade fixtures, and that they had the right to remove the same, during their tenancy. That the stable door fell down from ordinary wear and tear.

"The plaintiff contended, that the property could not be removed, as they were not trade fixtures, but the property of the plaintiff.

"The jury returned a verdict for \$100 actual damages and \$945 punitive damages, which was reduced.

"On motion for a new trial, Judge Spain granted a new trial *nisi* unless the plaintiff remit all punitive damages over \$500, which was done, and judgment entered in due course for \$600."

The defendants appealed upon exceptions, which will be reported.

First, Second and Third Exceptions: These exceptions seem to have been taken under misapprehension, as it does not appear from the record, that his Honor, the presiding Judge, excluded the testimony mentioned in the exceptions. Furthermore, the testimony was clearly inadmissible under section 438 of the Code of Procedure (1912).

Fourth Exception: The presiding Judge could not have charged the jury, as contended by the appellants, 1 without invading their province for the reason that the testimony upon that question was conflicting.

Fifth, Sixth, Seventh, Eighth and Ninth Exceptions: In the case of *Padgett v. Cleveland*, 33 S. C. 339, this Court recognized the following, as a correct definition of a fixture :

“A fixture is an article which was a chattel, but by 2 being physically annexed to the realty by one having an interest in the soil, becomes a part and parcel of it.” In that case the Court quotes with approval the following words of a distinguished Judge: “It is difficult to define the term, and there is inextricable confusion both in the textbooks, and the adjudged cases as to what is such annexation of chattels to realty, as to make them part and parcel, and pass by a conveyance of the realty. Any attempt to reconcile the authorities on the subject would be futile, and to review them would be an endless task.”

In *Evans v. McLucas*, 15 S. C. 70, the rule is thus stated : “As a general rule, all things annexed to the land, become a part of it, but to this there are exceptions, as where there is a manifest intention to use the alleged fixtures in some employment, distinct from that of the occupier of real estate, as where the chattel has been annexed for the purpose of carrying on trade, it is not, in general, considered as part of the realty.”

Mr. Justice McGowan, who delivered the opinion of the Court in the case of *Padgett v. Cleveland*, 33 S. C. 339, 11 S. E. 1069, uses this language: “We think, however, the general statement may be safely made, that in the later cases

there has been a decided relaxation, as to the original rule of the common law governing the freehold, and that this modern relation has been effected chiefly in favor of trade. * * * Besides this confusion in the law, and whether an article of personal property has been so annexed to the soil, as to make it a permanent fixture and as such not movable, is always a mixed question of law and fact."

In *Hughes v. Shingle Co.*, 51 S. C. 1, 28 S. E. 2, the Court quotes with approval the following statement of the rule: "Where a structure is placed upon land, not to promote the convenient use of the land, but to be used for some temporary purpose, external to the land, and the land is used only as a foundation, because some foundation is necessary for the business, then the structure and its belongings are not fixtures."

The great confusion in regard to the law of fixtures, has arisen from the effort to construe that as a fixture in one case, because it was so regarded in other cases. A fixture involves a mixed question of law and fact. It is incumbent on the Court to define a fixture, but whether it is such in a particular instance depends upon the facts of that case, unless the facts are susceptible of but one inference. In modern times, the question whether the article is to be regarded as a fixture depends generally upon the intention of the parties in the particular case. Tested by these principles the exception must be overruled.

Tenth and Twelfth Exceptions: We do not deem it
3 necessary to quote the testimony, to show that these exceptions cannot be sustained.

Eleventh Exception: What has already been said disposes of this exception.

Thirteenth and Fourteenth Exceptions: There was testimony tending to sustain the allegations of the com-
4 plaint as to the manner in which the defendant attempted to erase the sign, by the reckless use of paint.

Fifteenth Exception: The record does not disclose the fact, that the presiding Judge was requested to
 5 instruct the jury, that they could not consider this element of damages, on the ground that there was a failure of testimony to sustain the allegations of the complaint, in this respect.

Judgement affirmed.

MR. JUSTICE FRASER *disqualified*.

8613

HAYES v. SOUTHERN POWER CO.

1. **ELECTRIC COMPANIES—NUISANCE—NEGLIGENCE.**—Evidence that an electric company built a house on the premises of a cotton mill for transforming electric power for the mill to which the cotton mill had the key but to which the electric company had free access and in which its agents were at work the day before an infant climbed up to a window left open on that day, reached its hand through the open window and touched the wires on the inside heavily charged with electricity, is sufficient to support a finding of negligence on the part of the electric company.
2. **NEGLIGENCE—IBID.**—One establishing a dangerous agency at a place where others are liable to be and have the right to be, must use due care in guarding it.
3. **IBID.—IBID.—PROXIMATE CAUSE.**—Leaving a wire heavily charged with a current of electricity where a child may touch it may be the proximate cause of his injury caused by his touching it.
4. **ELECTRIC COMPANIES—NUISANCE—ISSUES.**—Whether an open window to a transformer house where live wires are located is an attractive nuisance is for the jury.
5. **NUISANCE—NEGLIGENCE.**—Maintaining on one's property inticements to the ignorant and unwary is tantamount to an invitation to visit, inspect and enjoy and the duty to protect from the dangers of the place follows as justly as if the invitation had been express.

Before SEASE, J., York, Fall term, 1912. Affirmed.

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April Term, 1913.

Action by Walker Hayes by guardian against Southern Power Company and Manchester Cotton Mills. Defendants appeal.

Messrs. T. F. McDow, McDonald & McDonald, H. C. Miller and Osborne & Cocke, for appellants. Messrs. McDonald & McDonald cite: Intervening cause: Cooley on Torts, 99; 24 L. R. A. (N. S.) 978; 64 S. E. R. 106; 24 Am. St. R. 670; Shear. & Rev. on Neg. 53; 1 L. R. A. (N. S.) 822; 43 S. E. 731; 104 S. W. 1128; 24 L. R. A. (N. S.) 978; 31 Id. 1020; 58 L. R. A. 399. Charge on the facts: 76 S. C. 49; 78 S. C. 103; 79 S. C. 120; 83 S. C. 56; 87 S. C. 190; 89 S. C. 492, 140; 91 S. C. 203. Duty to infant trespasser: 78 S. C. 19; 38 Cyc. 1773-4; 8 Am. St. R. 267.

Messrs. Dunlap & Dunlap and S. E. McFadden, contra. Messrs. Dunlap & Dunlap cite: As to attractive nuisances: 78 S. C. 10. Reckless disregard of another's rights will support punitive damages: 88 S. C. 7; 73 S. E. 340.

July 14, 1913. The opinion of the Court was delivered by

MR. JUSTICE FRASER. The appellants thus state their case:

"This was an action in the Court of Common Pleas for York county, S. C., to recover the sum of \$30,000 damages for alleged injuries to plaintiff, a minor, by coming in contact with electric wires in a transformer house, located on the property of the defendant, the Manchester Mills.

"It is alleged in the complaint that the defendant, Southern Power Company, is a corporation engaged in furnishing electricity to various industries, and, among others, to the Manchester Cotton Mills. That the said Southern Power Company built, or had built, with the permission and consent of the Manchester Cotton Mills, the trans-

former house in question, under an agreement to furnish electric power to said cotton mills. The specific and particular allegations of negligence alleged to have been the proximate cause of the plaintiff's injuries are found in the ninth paragraph of the complaint, and they charge the defendants with separate, joint or concurrent negligence, carelessness, recklessness and wantonness in the following particulars, to wit:

a. "In erecting and allowing to be erected the said transformer house, and installing therein dangerous machinery, appliances, apparatus and electric wires, heavily charged with electricity, and in not providing safe and proper means to protect the public and said infant from the dangers thereof; and the said defendant, Southern Power Company, its agents and servants, knowing that in and around said house children of tender years and ignorant of the dangers of said machinery, apparatus, appliances and electric wires, and being accustomed, did visit and play, being attracted to said house by the said appliances hereinbefore alleged; the said defendant, Southern Power Company, left the doors and windows of said house open and unprotected, thereby giving said children and this infant opportunity to be subjected to said dangerous machinery, apparatus, etc., heretofore alleged; and the Manchester Cotton Mills, its agents, servants and officers, knew, or ought to have known, that said doors and windows were open and unprotected, and knew that the said house contained dangerous machinery, apparatus, etc., heretofore alleged, and that there were children of tender years, including said infant, attending said public school, and that said children, including the said infant, frequently visited and played around and near said house, with the knowledge and acquiescence of both of said defendants.

b. "That the said house and the said danger, apparatus, appliances, etc., heretofore alleged, were under the control and management of the defendants, Southern Power Com-

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pany and the Manchester Cotton Mills, the said transformer house and the said schoolhouse on the property of the defendant, the Manchester Cotton Mills and the agents, servants and officers of the said the Manchester Cotton Mills, constantly used said house in getting the electricity to drive and operate its said machinery."

"The answer of the defendant, the Manchester Cotton Mills, consists of: (a) A denial of the material allegations of the complaint; (b) that plaintiff's injuries were caused by his act and negligence; and (c) that he was a trespasser on the premises of the defendant.

"The answer of the defendant, Southern Power Company, contains similar defenses.

"The case was tried at the November, 1912, term of the Court for York county, before Judge Thomas S. Sease, and a jury. At the close of the testimony for the plaintiff, the defendants made a motion for a nonsuit * * * This motion was overruled by the presiding Judge. At the close of all of the testimony, defendants made a motion for the direction of a verdict in their favor, upon the grounds, * * * This motion was also refused by the presiding Judge.

"After hearing the charge of the presiding Judge, the jury found a separate verdict against each of the defendants for the sum of \$4,166.67. The defendants thereupon made a motion for a new trial, which was also refused by the presiding Judge. Thereafter, judgment on the separate verdicts was entered against each of the defendants. Due notice of appeal was served, * * *

"The following facts appear to be undisputed in this case: That the plaintiff was severely burned and injured by coming in contact with the electric wires in the transformer house, located on the property of the defendant, the Manchester Mills. At what time this transformer was built, it does not clearly appear from the testimony. It appears that the plaintiff, a little boy, nine years of age, lived on the property of the Manchester Mills, and for several

months had been attending school in a building near the transformer house. During the recess hours, the children were accustomed to play in the neighborhood of the transformer house, sometimes at one place and sometimes at another. It appears that the Manchester Mills were principally in control of the transformer house, although the agents and servants of defendant, Southern Power Company, occasionally visited it for the purpose of making necessary repairs in the electrical apparatus. The transformer house itself is a brick building, having a door and three windows. Across the windows are slats about two and one-half inches wide nailed on at intervals of about two or three inches. The windows each had two sashes with six lights in each sash, of about ten by twelve inches each. The electric power wires were located in this house, near one of the windows, about five or six feet from the ground. These windows were located too high for the plaintiff to come in contact with the wires when standing on the ground.

"The plaintiff and other children had been warned not to go near the transformer house on account of the danger connected therewith.

"There were two panes of glass out of the lower sash of the window where the power wires were located, but this fact had no connection with the injury to plaintiff, as the windows were raised and hence the broken panes of glass were not within reach.

"On the day plaintiff received his injuries, he, with two or three other small boys, at the noon recess, went to the transformer house, and when first seen after his injury, had his knee in the window, and was hanging out by his hand. His hand was through the window touching the wires. In his own account of how he received the injury, the plaintiff stated that the other little boys had told him if he touched the wire it would make him jump and dance.

"As shown by the testimony, therefore, it was necessary that the plaintiff should climb up in the window, place his

hand between the slats and under the window before he could touch the wires, or come in contact with them. This seems to be the only manner in which his injury could have been received, according to the undisputed testimony.

"The exceptions raise five issues of law for the determination of this Court, to wit:

1. "That there was error on the part of his Honor in refusing to grant a nonsuit as to both defendants, and especially as to the defendant, Southern Power Company.

2. "That there was error on the part of his Honor in refusing to allow defendants to introduce certain testimony.

3. "That there was error on the part of his Honor in refusing to direct a verdict in favor of both defendants, and especially as to the defendant, Southern Power Company."

1. The second issue is withdrawn in the argument. The first and third cover the same ground and present really only one issue, to wit, was there evidence of negligence and was there evidence of negligence as to both defendants?

Appellants claim there is certainly no evidence of negligence as to the appellant, the Southern Power Company. The appellants have made common cause in this Court and both maintain that position, and yet, the appellant,

- 1 the Manchester Cotton Mills, in its answer, "allege that the transformer house mentioned in the complaint was erected by its codefendant, Southern Power Company, and was at the time of plaintiff's injury under its exclusive control and management."

However that may be, there was evidence to show that the transformer house was on the property of the Manchester Cotton Mills and it there received its power, and that keys were in the possession of its employee; that the agents of the Southern Power Company had access to the building and worked in there one whole day, and that the day after that, the window was open and that its employees constantly entered it on corporate business.

The negligence, if any, was the open window with unprotected wires charged with electricity within five or six inches of the open window. The undisputed testimony was that the children constantly played near the window. Home base was quite near. There was a dispute as to whether the plaintiff had ever been warned or not. The teacher did not claim to have warned the plaintiff about the deadly wires, but about the house. The house, or the near-by pole, was home base, used daily by little children, from six to twelve years of age. There was no fence or stake or line to mark the boundary line that must not be crossed. All the buildings were located on the property of the Manchester Cotton Mills.

2. There is no dispute that the plaintiff had the right to enter upon the property to attend school. If the permission was limited, then the limits must be defined before the licensee becomes a trespasser.

It is hardly necessary to cite authority to show that if a man establishes a dangerous agency where people are likely to be found, it must be guarded. If his Honor referred to "social duty and the ordinary offices of humanity" instead of the law of the State, the appellant cannot complain if the State law required the same thing, and it does.

3. The appellant claims that even if there was negligence, still the negligence was not the proximate cause, because there was an intervening cause when the plaintiff took hold of the wire, and without that, the injury would not have occurred. The authorities cited are not binding nor are they good law. A live wire stretched across the schoolhouse door would do no harm unless the plaintiff had supplied the intervening cause of coming in contact with it. The jury in this case have vindicated their intelligence and freedom from passion when they found only actual damages for inadvertence. They seemed to have come to the conclusion that all parties who were

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charged with the high and responsible duty of protecting their little children from so dangerous a thing as an undiminished and unprotected current and its deadly and dreadful consequences, were simply asleep at their posts and did not wilfully sacrifice this plaintiff to sordid gain.

4. Whether this was an attractive nuisance or not was a question for the jury. There was evidence that the plaintiff had been told that if he would take hold of the
4 wires, he would see things that were interesting to see, and the jury might have inferred from that, that the open window presented an attractive nuisance.

5. The twelfth and thirteenth exceptions are as follows:
12. "Because his Honor erred in charging the defendants' third request, which was as follows: 'The jury is charged that to maintain upon one's property enticements to
5 the ignorant and unwary is tantamount to an invitation to visit and inspect and enjoy, and in such cases the obligation to endeavor to protect from the dangers of the seductive instrument or place follows as justly as though the invitation had been express,' the error being: (a) That such charge was not applicable to any of the testimony in the case; (b) that such charge was a charge on the facts in violation of the Constitution of this State, inasmuch as it instructed the jury as to the weight of the testimony, and as to what inference should be drawn from the facts stated in such request to charge.

13. "Because his Honor erred in charging the jury as follows: 'It is true an infant may be a trespasser, that is an infant of tender years, in a technical sense, when it goes where it has no rightful permission or authority to be, but the same rule does not apply to infants as to adult trespassers. An infant *non sui juris* cannot be such a trespasser as would exempt any one from the duty of exercising ordinary care to avoid doing him an injury. And in this connection I desire to read a few paragraphs from another case by the Supreme Court of the State, and that

is as follows: Under the caption of "Liability for Injuries to Children," the author thus speaks in strenuous language of the doctrine that liability extends only to wanton injuries.' 1 Thomp. on Neg., sec. 1026. 'One doctrine under this head is that if a child trespass upon the premises of the defendant and is injured in consequence of something that befalls him while so trespassing, he cannot recover damages unless the injury was wantonly inflicted, or was due to the reckless, careless conduct of the defendant.' That is quoted from the eminent, distinguished author. The Supreme Court says: 'This cruel and wicked doctrine, unworthy of a civilized jurisprudence, puts property above humanity, leaves entirely out of view the tender years and infirmity of understanding of the child, indeed his liability to be a trespasser in sound legal theory, and visits upon him the consequences of his trespass just as though he were an adult and exonerates the person upon whose property he is a trespasser from any duty towards him which they would not owe under the same circumstances toward an adult.' Quoting from this same decision, 'Children, wherever they go must be expected to act upon childish instincts and impulses and others who are chargeable with a duty of care and caution towards them must calculate upon this and take precautions accordingly. If they leave exposed to the observation of children anything which would be tempting to them, and which in their immature judgment might naturally suppose that they were at liberty to handle or play with, they should expect that liberty to be taken,' the error being: (a) 'That such charge was not a correct statement of the law as to infant trespassers, inasmuch as the defendants would be exempt from liability to an infant trespasser in the same manner and to the same extent as they would be to adult trespassers, if they were not guilty of negligence, and the injury to the infant trespasser was the result of his own act; (b) that it was error to read to the jury under the circumstances

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extracts from a decision of the Supreme Court wherein was quoted the opinion of the author of Thompson on Negligence, because such quotation of Thompson on Negligence was *obiter dictum*, and at most was quoted by the Supreme Court in said case more by way of illustration than as a binding authority upon the issue raised in that case, which arose upon demurrer to the complaint therein; (c) that it was error to state to the jury that the Supreme Court in said case had characterized the law as laid down by many text writers and announced by many of the Courts of this country as a 'cruel and wicked doctrine unworthy of civilized jurisprudence' and 'puts property above humanity,' as this Court had never delivered any such utterance, and the language used was that of a text writer, and as used in the case in question was *obiter dictum*."

These exceptions cannot be sustained.

The charges were taken from the case of *Franks v. Southern Cotton Oil Co.*, 78 S. C., page 10, 58 S. E. 960, 12 L. R. A. (N. S.) 468, and this Court cites these authorities with approval.

The fourteenth exception complains of error in refusing a new trial. What has already been said covers this exception and is overruled.

The judgment appealed from is affirmed.

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THOMASON v. VICTOR MFG. CO.

1. **NONSUIT—MASTER AND SERVANT.**—In deciding if motion for nonsuit was erroneously refused, this Court will consider all the evidence. Here there was evidence to show the place furnished by the master was not safe.
2. **CHARGE—WILFULNESS.**—Refusal to direct verdict on issue of wilfulness is cured by instruction that nobody claims there is any wilfulness in the case and that verdict could only be rendered for actual damages.

Exceptions.

[95 S. C.]

3. **MASTER AND SERVANT—BURDEN OF PROOF.**—Where it is shown a servant was injured because of a defective or unsafe place, the burden is then cast on the master to show he used due diligence in keeping the place reasonably safe and suitable.
4. **CHARGE—REQUESTS.**—Where a Judge gives in his charge the substance of every sound proposition of law requested, he cannot be charged with error in refusing a request.

Before SEASE, J., Spartanburg, July, 1912. Affirmed.

Action by Melvin E. Thomason against Victor Manufacturing Company. Defendant appeals on the following exceptions:

1. "That his Honor erred in not granting the defendant's motion for a nonsuit on the ground that the only conclusion to be drawn from the testimony was that the plaintiff assumed the risk of the danger which caused the alleged injury; it being submitted that the plaintiff was a grown man and the alleged defect was plain and obvious.

2. "He erred in not granting the defendant's motion for nonsuit on the ground that there was no evidence of negligence in either the construction or the maintenance of the gangway; it being submitted (1) that the testimony did not tend to show that the gangway was defective or unsafe; (2) that the testimony did not tend to show that the defendant was negligent in permitting the grease spot to get upon the gangway, or in failing to discover it and have it removed.

3. "He erred in not granting the defendant's motion for a nonsuit upon the ground that the only inference to be drawn from the testimony was that the alleged dangerous condition of the gangway was not due to the negligence of the defendant, but to the conduct of a fellow servant.

4. "He erred in overruling defendant's motion for a directed verdict upon the cause of action based upon wilfulness and wantonness; it being submitted that there was no

testimony to support the allegation of the complaint as to this point.

5. "He erred in overruling the defendant's motion for a directed verdict as to the whole cause of action; it being submitted that there was no evidence tending to establish any degree of negligence on the part of the defendant and the only reasonable conclusion to be deduced from the testimony was that the alleged defect was plain and obvious and the risk thereof assumed by the plaintiff.

6. "He erred in charging the jury as follows: 'When it is made to appear that a servant was injured by defective or unsafe place it is *prima facie* evidence of negligence on the part of the boss, and the burden is then thrown upon the master to show that he used due care and diligence in keeping the place reasonably safe and suitable.' It is respectfully submitted: (a) That this was a charge on the facts; (b) that as a matter of law there is no such presumption, and we submit that when it is made to appear that the injury was due to the unsafe condition of the place it is for the jury to say whether the circumstances of the case would indicate negligence on the part of the master.

7. "He erred in refusing defendant's sixth request to charge, which was as follows: 'If there was such a grease spot upon the gangway and if you should find that it was dropped or spilled there by a fellow servant, of the plaintiff, the company would not be responsible, unless you also conclude that it was negligent in failing to discover or remove it before the accident.' It is respectfully submitted that this language embodied a correct proposition of law applicable to the case not elsewhere covered in the charge, and was not upon the facts.

8. "He erred in refusing defendant's tenth request to charge, which was as follows: 'I charge you that there is no evidence of any negligence in this case except that based upon the alleged presence of grease upon the gangway. As to this you must conclude that the defendant was not liable

unless you find that there was a grease spot as alleged, and that the defendant negligently placed it there or was negligent in not discovering and removing it before the accident. If you find that the defendant did not place it there, but that it got there through some act of a fellow servant, and that the defendant was not negligent in failing to discover and remove it before the accident, then your verdict must be for the defendant.' It is respectfully submitted that this language embodied a correct proposition of law applicable to the case not elsewhere covered in the charge, and was not upon the facts."

Messrs. Haynsworth & Haynsworth and Bomar & Osborne, for appellant. Messrs. Haynsworth & Haynsworth cite: The plaintiff assumed the risk apart from the grease spot: 72 S. C. 237; 74 S. C. 419; 27 S. C. 71; 91 L. R. A. 861; and with the grease spot: 5 Words & Phrases 4012; Labott on M. & S., secs. 260, 274; 35 N. E. 648; 27 S. C. 71.

Messrs. C. P. Sims and Sanders & DePass, contra. Messrs. Sanders & DePass cite: It is duty of master to use due care and keep place safe: 72 S. C. 402; 18 S. C. 275; 42 S. C. 211.

July 14, 1913. The opinion of the Court was delivered by.

MR. JUSTICE WATTS. This was an action for damages (compensatory and punitive) by respondent against appellant for an injury sustained by the respondent while in the employ of the appellant. The answer of appellant was a denial of the material allegations of the complaint, and sets up the plea of contributory negligence and assumption of risk on the part of plaintiff-respondent. The case was tried before Judge Sease, and a jury, and resulted in a verdict in favor of plaintiff-respondent, in the sum of five hun-

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dred and fifty dollars. The appellant appeals and alleges error on the part of his Honor in eight exceptions.

The first three exceptions allege error on the part of his Honor in not granting a nonsuit at the close of plaintiff's testimony. In the consideration of this question this Court

will consider all of the testimony in the case, and

- 1 from the evidence in the case, we see no error on the part of his Honor in refusing to grant the nonsuit.

There is no question but that it is the duty of the master to furnish the servant a reasonably safe place within which to work, and keep the place within reasonable repair. There was abundance of evidence to go to the jury to be determined by them whether the place, at which plaintiff was injured, was unsafe, and these exceptions are overruled.

The fourth and fifth exceptions allege error in not directing a verdict for the defendant on the ground that there was no evidence of wilfulness or wantonness, and also on the whole case. There was sufficient testimony to

- 2 carry the case to the jury on the question of negligence, and his Honor committed no error in this; he should, however, have sustained the motion that there was no evidence to sustain the contention that there was wilfulness and wantonness, but this was harmless, and not at all prejudicial to the defendant, for in his charge to the jury, later, he said to them: "Negligence is inadvertence. Now, on the contrary, as a contrast, but with that you have nothing to do in the consideration of this case—wilfulness is advertence. Nobody claims in this case that there is any wilfulness;" and throughout his whole charge he nowhere told the jury, in estimating damages, that they could award punitive damages for wilfulness or wantonness, but was careful to charge them that in estimating damages they were to consider the question of negligence on the part of defendant, and contributory negligence and assumption of risk on the part of plaintiff. These exceptions are overruled.

The sixth exception alleges error in his Honor's charge to the jury. We see no error as complained of. It is the duty of the master to furnish a reasonably safe and suitable place for the servant to work at, and keep the

3 same in reasonably safe and suitable repair. Mr.

Justice Woods, in *Green v. Southern Ry.*, 72 S. C., page 401, 52 S. E. 45, uses this language: "In every suit of a servant against a master for personal injury arising from the use of machinery, inquiry is directed mainly to two forces operating under natural laws, namely, the master's machine supplied to the servant, and the servant's mind and hands acting on the machine. The injury is usually due either to the error of the master in failing to supply safe machinery, or to the error of the servant in the use of his mind and hands, or to both of these causes acting together. But an error of the master in furnishing a defective machine does not conclusively imply negligence by the master, for he may have used due, and even great, care in its selection; nor does an error of the servant in the use of the machinery conclusively imply negligence on his part, for he may be in actual error while doing just what a prudent man would do under like circumstances. Neither the master nor the servant is charged with perfect knowledge of all natural laws and forces under which they act, nor even with errorless conduct in applying their imperfect knowledge of such laws and forces; and hence they are chargeable only with the results of errors, which are due to negligence. The servant on entering the employment assumes the risk of his own errors, whether due to negligence or not, and he assumes also the risk of the operation of the machine and of the errors of the master unless the master fails to use due care in making the machine safe. When an injury to a servant is proved to result from a defective machine, the law puts upon the master the burden of proving that he used due care in making it safe. *Lasure v. Mfg. Co.*, 18 S. C. 275; *Carter v. Oliver Oil Co.*, 34 S. C. 211, 13 S. E.

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419; *Branch v. Ry. Co.*, 35 S. C. 405, 14 S. E. 808," and his Honor committed no error.

We cannot see that he was in error in refusing to charge the seventh and eighth exceptions, he left all of the facts to the jury to find what were the conditions at the time of the injury. He charged the jury carefully and fully

4 as to the issues made by the pleadings and evidence, and in his own language, instructed them fully as to the law of the case, and all of the law embodied in these requests were substantially charged in his Honor's general charge. Reference to the charge shows that the substance of every sound proposition of law, contained in the requests, was given to the jury. "The Judge has the right to charge the law of the case in his own language, and where he fully discharges this duty, he is not required to charge abstract or sound propositions of the law applicable." *Joyner v. Atlantic Coast Line R. R. Co.*, 91 S. C. 104, 74 S. E. 825.

All exceptions are overruled.

Judgment affirmed.

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D. W. ALDERMAN & SONS CO. v. McKNIGHT.

APPEAL—TITLE.—Where the issues referred involve title to land, findings by referee affirmed on Circuit are not reviewable in this Court.

Before COPES, J., Clarendon, December, 1911. Affirmed.

Action by D. W. Alderman & Sons Co. against Sara A. McKnight. Plaintiff appeals.

Mr. Charlton DuRant, for appellant, cites: *Adverse possession must be proved against presumed possession of one holding legal title*: 71 S. C. 330; 48 S. C. 28; 37 S. C. 576; 3 S. C. 34; 82 S. C. 221.

Messrs. Davis & Weinberg, contra, cite: Possession for twenty years presumes a grant: 48 S. C. 490; Hill Ch. 376; 2 Rich. 19; 72 S. C. 312; 86 S. C. 294. Not necessary to notify of possession: 86 S. C. 461.

July 15, 1913. The opinion of the Court was delivered by

MR. CHIEF JUSTICE GARY. The facts in this case are thus stated in the decree of his Honor, the Circuit Judge:

"The defendant in this action entered into a contract with plaintiff, assignor, to sell to it all of her swamp land to which she had a good title, at twelve and 50-100 dollars per acre, the number of acres to be ascertained by two surveyors and was paid two hundred and fifty dollars in cash. Upon the survey being made, the plaintiff contended the defendant had a good and marketable title, to only about two hundred and thirty-six acres of swamp land, whereas the plat made up by the surveyors, showed an area of three hundred and ninety-eight and two-tenths acres, practically within the lines claimed by the defendants.

"The plaintiff then brought this action, alleging its willingness to comply with its contract, and asking that the defendant be required to convey, as required by its contract.

"The defendant answered alleging, that she was the owner of three hundred and ninety-eight and two-tenths acres of swamp land, which she was ready and willing to convey by her warranty deed to plaintiff, but that she was unwilling to convey a part, and not all of the swamp land to which she had a good title.

"The real issue then submitted to the referee was, whether the defendant had a good and marketable title to all the land claimed by her, as shown upon the plat of the two surveyors, and the referee held several references and made a full and exhaustive report, in which he found that the defendant was the owner of practically all the land claimed by her,

and shown upon the plat of the surveyors, and recommended that upon the surveyors ascertaining the number of acres within a small triangle, and deducting that from the three hundred and ninety-eight and two-tenths acres, that the parties perform the contract, with respect to the balance.

The matter came on before me upon exceptions by the plaintiff to this report, and after hearing argument thereon, I took the matter under advisement, and upon a careful reading of the testimony and consideration of the whole case, I find that the referee is right in all of his findings and conclusions; that the defendant is the owner of, and in possession of, and has a good and marketable title to all the Black River Swamp land adjacent to her home place, lying north of the uplands, and extending in, as far as the practical center of the swamp * * *."

The plaintiff appealed upon exceptions, several of which are based upon alleged errors in findings of fact, which are not subject to review by this Court, as the real issue submitted to the referee, involved the title to the land in controversy.

All the other exceptions are overruled, for the reasons stated by the special referee, whose report was confirmed in all respects by his Honor, the Circuit Judge.

Judgment affirmed.

MESSRS. JUSTICES HYDRICK *and* FRASER *concur in the result.*

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·WILKINS v. HILTON-DODGE LUMBER CO.

1. **INJUNCTION.**—A Circuit Judge should not dissolve a temporary injunction on motion on affidavits where doing so would require him to decide a question of fact.
2. **IBID.—RIGHT OF WAY.**—Where a right of way has been sold by the owner of a tract of land to another, he does not thereby relinquish his right to cross the right of way with another for his own convenience, when such crossing can be made so as not to interfere materially with the use of the right of way, and on such showing a temporary injunction should be dissolved.

MR. CHIEF JUSTICE GARY *dissents as to the latter.*

Before MEMMINGER, J., Charleston, December, 1912.
Reversed.

Action by V. D. S. Wilkins against Hilton-Dodge Lumber Comapny. Defendant appeals.

Messrs. Mordecai & Gadsden, Rutledge & Hagood and Padgett, Lemacks & Moorer, for appellant. Messrs. Benj. H. Rutledge and B. A. Hagood cite: Constructive notice: 14 S. C. 322; 39 S. C. 84. Recording option is not notice: 1 Strob. Eq. 393; 39 S. C. 81; 21 Ency. 925; 113 N. W. 287; 100 N. W. 9; 68 At. 839, 836; 53 S. E. 797; 6 L. R. A. (N. S.) 403; 19 S. E. 536; 60 C. C. A. 103; 24 Ency. 81; Harp. Eq. 191; 17 Johnson 351; 45 S. C. 343; 53 S. C. 341; 24 Ency. 79. A purchaser is not bound by notice of an equity: 2 Hill Ch. 421; 12 S. C. 108; 16 S. C. 384; 48 S. C. 516; 77 S. C. 32; 6 L. Ann. R. (N. S.) 408; 27 S. C. 408. Injunctions do not follow automatically the allegations: 87 S. C. 566; 69 S. C. 551; 89 S. C. 143; 86 S. C. 160; 176 U. S. 44; 2 Spelling on Ex. Relief 1041.

Messrs. Logan & Grace, contra, cite: An option may be enforced: 33 Fed. 530; 56 Fed. 1; 26 S. W. 334. Recording option is notice: 44 Mass. 390. Motion to dissolve was

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properly refused: 69 S. C. 156; 86 S. C. 160; 87 S. C. 568; 69 S. C. 156; 86 S. C. 160.

July 15, 1913. The opinion of the Court was delivered by

MR. JUSTICE WATTS. This is an appeal from an order of his Honor, Judge Memminger, dated December 23, 1912, refusing to dissolve a temporary restraining order issued by his Honor, Judge Prince, on November 27, 1912. The facts involved in the appeal in brief are: That on July 23, 1912, the plaintiff-respondent, Wilkins, and H. E. Savage, obtained from William B. Fields and Rebecca Bissell, for valuable consideration, an option to purchase a right of way, thirty (30) feet in width, across the lands of said Fields and Bissell, known as Deer Island, for the purpose of building a railroad to carry on timber operations. That after that time, on September 10, 1912, Fields conveyed all of his undivided one-half interest in the timber on said Deer Island tract of land, together with a right of way thirty feet in width over said land, to the Savannah Timber Company, the stock of which said company is owned by the defendant-appellant. That in September, 1912, Rebecca Bissell, for valuable consideration, conveyed her one-half interest in the timber on the same tract of land, known as Deer Island, together with a right of way over the land, thirty feet in width, to the Savannah Timber Company. That the stock of this company is owned by the defendant-appellant. That on October 19, 1912, Fields and Bissell, in pursuance of the agreement, previously by option given to Wilkins and Savage, conveyed to them the right of way of thirty feet in width, and on the same day, to wit, October 19, 1912, Savage conveyed to Wilkins his interest in the right of way, conveyed to him and Wilkins by Fields and Bissell. That after this time the appellant, the Hilton-Dodge Lumber Company, owner of the Savannah Timber Company, began to locate a right of way on

said Fields' or Deer Island tract of land, which would incumber the right of way of respondent, and, as alleged in the complaint, result in a practical confiscation of his property, and irreparable damage, and in order to prevent this the respondent began this proceeding by summons and complaint, and obtained from Judge Prince a temporary restraining order. The appellant moved to set aside this order before Judge Memminger, and he refused this motion. The grounds relied on by appellant before Judge Memminger were mainly two: First, that the appellant was a *bona fide* purchaser, without notice, for valuable consideration of the premises of which it was in possession and that its rights of way were exclusive, and that respondent's rights, if any, were obtained subsequent to his, and secondly, that he was the owner, unquestionably, of the timber, and the rights of way across said premises, and that the crossing of the respondent's right of way, alleged to be about to be made, could work no irreparable injury nor, in fact, injury of any kind to respondent. On hearing this motion, Judge Memminger in his order says: "A clear cut question of fact is made as to whether defendant had actual notice of plaintiff's option before the purchase. The option was recorded, but it appears that its execution by one of the owners of the land shows that on record there is no subscribing witness; whereas, the original, it is claimed for plaintiff in reply, has the names of witnesses, which it is claimed were left off the record by error of the clerk of court." But there was testimony before his Honor clearly showing that the appellant had actual notice of the option of respondent to purchase the right of way before the appellant purchased. The respondent and others make affidavit to this, and appellant denies it under oath.

From the order of Judge Memminger, appellant appeals, and alleged error on practically three grounds: That he erred in not holding that appellant had no actual notice, and even if it did, it did not affect its rights; that appellant

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had no constructive notice, as the option is not a recordable instrument, and consequently no notice, and if a constructive notice by recording, it was improperly recorded as to one-half of the premises, and the third ground, that the injuries specified in the complaint as irreparable, were remote and speculative, and were a subject for action for damages, and not for injunction.

We do not think that his Honor was in error in refusing to dissolve the injunction on the grounds there was no actual or constructive notice to the appellant of the option of the respondent. To have done so, would have acquired

1 him to determine a question of fact, on the affidavits, which this Court has repeatedly held, is unsatisfactory, and by refusing to do so the Circuit Court followed the decisions of this Court in a number of cases. *Alderman v. Wilson*, 69 S. C. 158, 48 S. E. 85; *Kelly v. Tiner*, 86 S. C. 160, 68 S. E. 465; *Childs v. Columbia*, 87 S. C. 568; 70 S. E. 296.

We, however, think that his Honor was in error, in not dissolving the injunction, under the authority of *Miller v. Seaboard Air Line Ry.*, 94 S. C. 105. Admitting for the purpose of this case, that the respondent had a valid

2 instrument anterior and prior to that of appellant from Fields and Bissell to the right of way claimed by them across Deer Island, and that the appellant knew this before its purchase from Fields and Bissell. Yet Fields and Bissell still owned the land, the fee was in them subject to the right of respondent's right of way, and it would be both unreasonable and absurd to say, that because they had sold a right of way across their lands, that the purchaser of the right of way could prevent them, the owners, from crossing this right of way, in going to and fro across their lands, and not enjoy the use of the lands, of which they were the owners, and the record shows that the appellant here purchased the timber on these lands from Fields and Bissell, and now are the

owners of the timber in question and right of way. The respondent would only have the right to claim their right of way as purchased, and could not prevent the owners of the land in crossing this right of way. Mr. Justice Woods, in *Miller v. Seaboard Ry. Co.*, on page 109, *supra*, uses this language: "The rule established by authority and reason, from which we find no dissent, is that where a railroad company acquires a right of way, either by deed, or by condemnation, which divides one tract of land into two parts, the law will not impute an intention so unreasonable as that the railroad company intended to exclude the owner from the right to pass from one part of his land to the other, or that the owner of the land meant to part with such right, but, on the contrary, will hold that the intention was that the owner of the land would of necessity have the right of crossing, if a crossing could be made so as not to interfere materially with the use of the right of way, acquired, by the railroad company. *Baltimore & O. Ry. v. Slaughter*, 167 Ind. 330, 79 N. E. 186; *Kansas City & E. R. Co. v. Kregelo*, 32 Kan. 608, 5 Pac. 15; *Atchison, T. & S. F. Ry. Co. v. Colon*, 9 Kan. 338, 601, 5 Pac. 321; *New York & N. E. Ry. Co. v. Board of Railroad Commissioners*, 162 Mass. 81, 38 N. E. 27; *Kirk v. Railway Co.*, 25 So. 463; etc., etc. While the precise point was not involved in *Simpkins v. Columbia & G. R. R. Co.*, 20 S. C. 258, that case was decided on the same principle."

Order appealed from reversed.

MR. CHIEF JUSTICE GARY, *dissenting*. The sole object of the plaintiff's action, is to obtain a permanent injunction. In such cases, the rule is thus stated in *Cudd v. Calvert*, 54 S. C. 487: "Where the action is brought solely for the purpose of obtaining an injunction, and where if the facts alleged in the complaint are found to be true, a proper case for injunction would be presented, it is error to dissolve a temporary injunction upon a mere motion, heard upon affi-

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davits, as that would deprive the plaintiff of his legal right to have the facts determined in the mode prescribed by law, instead of by affidavits. A most unsatisfactory mode of eliciting truth. Indeed, the practical result in a case like this, would be to dismiss the complaint upon a mere motion heard upon affidavits, without any opportunity being afforded the plaintiff, to have the facts upon which he bases his claim for relief, determined in the mode prescribed by law."

I therefore dissent.

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HORN v. CONWAY, COAST AND WESTERN R. R. CO.

RAILROADS—NEGLIGENCE—ISSUES.—Evidence to the effect that a pedestrian was walking along a path beside a railroad track where people were accustomed to walk without objection from the company in a populous manufacturing community while the plants were in operation, the noise of which drowned the noise of the engine, that he stepped on the track to avoid some railroad iron left in the path by the company, that he was struck by an engine running backwards as he stepped on the track, that no signals were given as the engine approached, carries the issues of negligence of the railroad company and of contributory negligence of the pedestrian to the jury.

Before G. W. RAGSDALE, special Judge, Horry, October term, 1912. Affirmed.

Action by N. E. Horn against Conway Coast and Western R. R. Co. Defendant appeals.

Messrs C. P. Quattlebaum, L. B. Singleton and F. L. Willcox, for appellant.

Mr. Willcox cites: Duty of one about to cross a railroad track: 94 S. C. 143. Respective rights of railroad company

and one claiming the right to go upon its track: 67 S. C. 499; 61 S. C. 556.

Mr. H. H. Woodward, contra, cites: Whether plaintiff was licensee was for jury: 86 S. C. 394, 301; 76 S. C. 378; 72 S. C. 393.

July 19, 1913. The opinion of the Court was delivered by

MR. CHIEF JUSTICE GARY. This is an action for damages, alleged to have been sustained by the plaintiff, through the wrongful acts of the defendant.

The allegations of the complaint, material to the questions involved, are as follows:

(1) "That for a distance of about one mile from its depot at Conway, towards Myrtle Beach, the railroad of the defendant runs parallel with, and near to, the Waccamaw River, and very close to large factories and lumber plants, employing large numbers of hands, and having tenant houses along, and almost immediately adjoining, the defendant's said track and right of way; that a large and remunerative freight business is transacted by defendant with and by means of said factories and plants; that impassable swamps and creeks are close to this portion of defendant's track on both sides, and especially on the side away from the said river, and the said track and right of way of the defendant is the only practicable and convenient way in which pedestrians may reach said factories and plants, and the houses along said track, or to pass between the said town of Conway and a section of the country lying between that point and Myrtle Beach; that for a long number of years past the employees of the said factories and plants, and the public generally, have been using daily the portion of defendant's track and right of way above referred to, for the purpose of going to and returning from their work, or business, at the said plants

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and factories, and in passing through to and from other points in said county, all of which has been not only with the full knowledge of the defendant, its agents, servants and employees, but with its and their encouragement, consent and invitation, and acquiescence; that this portion of defendant's track and right of way passes through a very populous section, where people are constantly passing, and were passing at the dates hereinafter mentioned, and for a long number of years before, and ever since said date, the defendant allowing the public to use a footway on each side of its track throughout the portion of its track and right of way above mentioned, with its full knowledge, consent and acquiescence, and without any warning, protest or notice of any kind on its part.

(2) "That some noise is produced at all times along the said way, by means of the machinery and operations in said factories and plants, sufficient to confuse pedestrians, as to the ordinary noise of an approaching train, unless the whistle is blown or the bell is rung, to give warning of the approach of defendant's train, which fact was well known to the defendant, its servants, agents and employees, but was not so well known to the plaintiff, at the time of his injury hereinafter stated.

(3) "That on the early morning of the 13th day of July, A. D. 1911, while the plaintiff was passing along the defendant's track and right of way, near the said factories and plants, on his way from Conway to one of them, the defendant wilfully, recklessly, wantonly and in a grossly negligent manner, and without regard to the rights of humanity, without blowing the whistle or ringing the bell, and without giving any notice or warning of its approach whatever, in open daylight, in plain view of plaintiff for a half mile or more, without keeping any lookout, ran a train of flat cars, attached to a locomotive, backwards, up behind the plaintiff, at a great rate of speed, and hit the plaintiff with said cars a severe and terrible blow in the

back and legs, whereby he was thrown from the path, and sustained very painful, agonizing and permanent injuries."

The defendant denied all the allegations of the complaint, except its corporate existence, and set up the defense of contributory negligence on the part of the plaintiff.

At the conclusion of all the testimony, the defendant's attorneys made a motion for the direction of a verdict, on the ground that there was no testimony tending to show negligence on the part of the defendant; and, on the further ground, that the plaintiff was guilty of contributory negligence.

His Honor, the presiding Judge, granted the motion, as to the cause of action for punitive damages, but refused it as to the cause of action for actual damages.

The jury rendered a verdict in favor of the plaintiff for seven hundred dollars, and the defendant appealed.

The exceptions raise, practically, but two questions, to wit: Was there any testimony tending to sustain the allegations of negligence? And, did the testimony show that the plaintiff was guilty of contributory negligence?

N. E. Horn, the plaintiff, testified as follows: "When did that accident occur that is mentioned in the complaint? July 13th, 1811. Describe how it happened? I was walking on the sidewalk on the side of the railroad, which is a very plain path on each side of the track, and was going along there— What caused the plain path? Where people walked frequently. State how it happened to you? I was going along and right against the mill— Was it pretty near opposite this plant? Yes, sir; pretty near opposite, and I heard somebody hollering, and I turned my head and saw the train, and as I turned my head and saw it, it struck me. I didn't have time to step or move any way. How long before they hollered did you turn? I turned as quick as I could, and it struck me on my right hip. Now, was that engine exhausting; did you hear it exhaust? No, sir; I think it was running very easily. Why? I think

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it was a little down grade. Did you hear it blow? No, sir; it didn't blow; if it had blown I would have heard it. Did it ring the bell? No, sir. Was that plant in operation? Yes, sir. How much noise did that make? It would make right smart noise, but not enough to drown the noise of a whistle or bell, close to you. Now, Mr. Horn, explain what kind of use the public made, if any, of that track there? How long have you known that place? I have known it about four years; I have known it longer than that, but I have not been passing along on it, to know the public used it, only something like three or four years. State how frequently the public used it? I worked at the Conway Lumber Company, I reckon something like three years ago or four, and boarded over there at the old Kanawha plant. Is that another plant on the railroad? Yes, sir; it comes to the railroad. How far from this plant where you were injured? It is something like a half or three-quarters of a mile. I boarded with Mr. Grainger, and in passing I would see lots of people I didn't know; every day in passing, I would see people traveling the road. Did they travel it every day? Yes, sir; some days I would see as high as twenty-five walking along the road, and other days I would see them passing. Did the hands of these plants use it? Yes; they used it frequently. Did they use it every day? Yes; the hands that worked over here at the wood product mill used it every day, twice a day, going and coming. Was there any notice or protest made as to the use of that part of the track? No, sir; only at the bridge. There was a notice at the bridge? Yes, sir; this: 'This bridge is no thoroughfare. Keep off, danger.' That is the bridge at Conway? Yes, sir. Could anybody see you from Conway? If you were standing on the bridge at Conway and looking towards the place where you were injured, could they see you on the track? Yes, sir. Did the train come up behind you? Yes, sir. What other ways are there to go, or come from that

direction, from those plants? Do people live in the section of the county over there? Yes, sir; some live over there and some live at the old Kanawha plant, and some at the Red Hill. Do the farmers over there use that track in passing into town? Yes, those at Red Hill do. Frequently? Yes, sir. What other way could they go? No other except by going around by the ferry above there. A long way out of the way? Yes, sir; I suppose three or four miles out of the way. How about a boat on the river? They could come down the river on a boat. Did the railroad do any business with these plants? Yes, sir; they haul lightwood for them. Was there any obstruction in that path; how did you happen to step upon the track? There was some iron lying down here. Explain how that came about? There was some iron lying down there, and to keep from walking on the iron, I stepped upon the ties to get by. The train had changed schedule; the last account I had of it it had been going over there in the afternoon, and I was not expecting the train. You say there was a pile of railroad iron? Yes, sir; where they had tore up the old track and put heavy iron down. Could you pass on the off side of it? Yes, there was nothing over there. Could you have passed on the off side of the iron? Next to the ditch? Yes. Not very well; it was grown up in bushes; and I would have had to go down in the edge of the ditch. Can you hear well? Yes, sir. You are not hard at hearing? No, sir."

W. H. Crisp, a witness for the plaintiff, thus testified: "Were you working at a place where you could see to Conway? Yes, sir. What did you see? I saw him step up on the end of the ties, about the time the engine came to him. Did it strike him about the time he stepped up there? Yes, sir. Did that accident happen immediately opposite that plant? About twelve or fifteen feet south of the 'hog.' What did he step upon the track for? I don't know. Was there anything to show what he did it for?

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I didn't see it. He had plenty of room between the ties and the railroad; about eighteen inches, if not more than that, between the end of the ties and the railroad iron, where they had taken it out and thrown it to one side. Just as the engine got opposite the chemical works, Mr. Horn, who, up to that time, had been walking on the path on the south side, stepped up on the track? Yes, sir. How far did that engine stop from Mr. Horn? Not over an engine length. Was the 'hog' running on this occasion? Yes, sir. Isn't it a fact that the 'hog' makes considerable noise when it is in operation? Yes, sir."

P. H. Sasser, the conductor on the train when the plaintiff was injured, testified in behalf of the defendant, as follows: "Where were you on that occasion? I was sitting in the cab of the engine, on the fireman's seat. How was that engine equipped as to a pilot? It had a pilot on both ends, one on the tender, and one at the front. How far could your engine be seen from the point, that Mr. Horn was first observed by you? Three-quarters of a mile. What was the first you saw of Mr. Horn that morning? I saw him walking by the side of the track. How far was the Kanawha plant beyond the point where Mr. Horn was struck? Probably half a mile or three-quarters. About how fast was this train running? Eight or ten miles an hour, or it might not have been that fast. After getting the signal, we stopped probably in the length of the engine, or a little further than that. Were there any cars in front of the engine as it was then running? No, sir; nothing but an engine; we were handling a light engine. What was the first notice you had that Mr. Horn had got up on the track? I saw the signal of the fireman and flagman; they threw their hands up and hollered, 'Stop!' How far did it take to stop the engine? I don't think the engine went over twice its length. Were there any obstructions there, such as would, in your opinion, lead a reasonable man to suppose that one walking along there was going to cross

without any warning? No, sir; just a string of rails. The track had been relaid and the rails were stretched out all along there. Is it or not a fact that this pathway is used for the convenience of the people who happen to live in that section, or have work over there, and not by the public at large? I guess so; some of the public people may use it."

Cross-examination.

"Didn't you frequently see people on the track where Mr. Horn was hurt? Yes; and always looking out for them. Did you ring the bell or let him know you were coming with an engine? There was nothing to ring the bell for; there was no obstruction on the track. You remember the iron at the track where he was injured; you knew it was there? Yes; I knew it was there. You didn't blow the whistle? If he had been on the track I would have blown the whistle. You saw him walking on the side of the track? Yes, sir."

Redirect examination.

"Was it only at this point where Mr. Horn stepped up on the track that the iron was lying? No, sir; the iron was all the way on the ground there."

The Court: "How far were you from him when you first saw him? I saw him two or three hundred yards of us, and then I saw him about fifty yards, and when I saw him he was about four feet clear from the track."

Henry Baldwin, the engineer, testified as follows: "Were you running at any more than your customary speed? We were running slower than anywhere else. Were you running as you usually do on that road? Yes, sir; always take precautions along there. Was there anything to obstruct Mr. Horn from being seen? Nothing in the world. Had you seen him at all? I had seen people down the road, as is an everyday occurrence, about that plant. They are working along by the track, and sometimes people walk ahead of you on the road, and they turn out before you

get to them. I saw people in the road before I left Conway. How far were you from where Mr. Horn was struck before you stopped? When I stopped the engine and jumped off, the back pilot of the engine was just a little past him. From the time the word was given me, I think I stopped the engine in its length and a half. I know I skidded the drivers."

George Clark, the flagman, thus testified: "What was the first you saw of Mr. Horn? On the side of the track, walking along. Was there anything unusual, to see people walking along there? No, sir. When did you first see that Mr. Horn was going into a place of danger? Just about eight or ten feet before we got to him, he stepped right up on the track. What did you do when he did that? I threw up my hand and signed the engineer down and hollered."

The facts in *Sanders v. Ry.*, 90 S. C. 331, were very similar to those in the present case. In that case there was testimony to the effect that the plaintiff was injured while walking in a well beaten path along side of defendant's track, at a place where the public had been accustomed to walk for many years, without objection on the part of the railway company; that the train which struck him was running backwards, at a rate of from twelve to twenty miles an hour, through a populous section of the city of Charleston, where men, women and children were constantly passing and repassing, upon defendant's right of way, and upon and near its tracks; that the train ran upon him from behind, without giving any signal or warning of its approach.

In that case the Court said: "We think this testimony made out a *prima facie* case for plaintiff. From it the jury *might* reasonably have inferred that the use of its right of way by the public was known to and acquiesced in by the defendant, and, therefore, that plaintiff was a licensee, and entitled to ordinary care on the part of defendant, to pre-

vent injury to him; and, also from the frequency of the use by the general public, that defendant should have anticipated the presence of persons on or near its track at that place, and should have exercised due care to prevent injury to them. * * * We think his Honor erred, also, in holding that plaintiff was guilty of negligence in walking too close to the track, where there was room enough for him to walk, at a safe distance from it. The testimony was, that he was walking in a well defined path. From this the jury might have inferred that the path had been used by many people before, and that in walking where many others had gone before, plaintiff was exercising ordinary care. In Lamb's case the Court said: 'In the cases cited (that is the Jones case and the cases following it) it was entirely consistent with reason to say that it was not negligence *per se* for a person to walk on the right of way expecting to step off on the approach of a train.' "

Even a cursory glance at the foregoing testimony will show clearly that the present is a much stronger case than that of *Sanders v. Ry.*, 90 S. C. 331.

I do not deem it necessary to cite other authorities to show that there was negligence on the part of the defendant, and that the issue as to contributory negligence was properly submitted to the jury.

Judgment affirmed.

MR. JUSTICE HYDRICK *concur*s.

MR. JUSTICE FRASER *concur*s in the result.

MR. JUSTICE WATTS *dissent*s. This was an action for damages alleged to have resulted from personal injuries sustained by plaintiff-respondent by reason of being struck by a train of defendant-appellant company, on July 13, 1911. The case was tried before special Judge G. W. Ragsdale and a jury at October term, 1912, and resulted

in a verdict for \$700 in favor of plaintiff. After entry of judgment appellant appeals and asks reversal by six exceptions.

The first exception complains of error in not directing a verdict for the defendant on the ground that all of the testimony tends to show that the injuries to the plaintiff resulted not from any negligence upon the part of the railroad company, but by reason of plaintiff's own negligence. That according to all of the testimony, including that of the plaintiff, plaintiff stepped on the railroad track immediately in front of a moving train without looking or listening or taking any other precaution to ascertain whether or not the train was approaching, being at that time surrounded by noise, which prevented his hearing the approach of the train, and for these reasons his injuries were solely due to his own negligence.

The second exception complains of error in not directing a verdict on the ground that even if it is conceded that the defendant was negligent the proof of contributory negligence on the part of the plaintiff was so complete that only one conclusion could be arrived at, to wit: the plaintiff's contributory negligence was the proximate cause of his injury, without which such injury would not have resulted. It appears from the record that his Honor, in refusing to direct a verdict for defendant, directed the jury that there was no testimony in the case from which wilfulness might be inferred.

We think these exceptions should be sustained, and that his Honor was in error in not directing a verdict for the defendant-appellant. The evidence shows that the appellant operated a railroad, a portion of which extends from Conway across Waccamaw River in the direction of the Atlantic Ocean, to Myrtle Beach. Respondent was injured by locomotive of appellant about half a mile from Conway. Near the point at which he was injured there was a plant known as the wood products plant. Between one-half to

three-fourths of a mile beyond the wood products plant, traveling from Conway, was the Kanawha lumber plant. The railroad tracks between Conway and the point at which plaintiff was injured, crosses a drawbridge over Waccamaw River, and another long trestle. At each of these trestles was a sign maintained by the railroad, warning people not to use the trestle. Plaintiff lived about two miles from Conway, on the opposite side of the river from the place where he was injured, and on this occasion was traveling in the direction of Kanawha plant. He knew that the trains run over this track four times a day. On this occasion he used the trestles in defiance of the warning on the sign boards not to use them. It does not appear in evidence what object he had in view, or what business he was on in traveling towards the Kanawha plant at the time of his injury. The evidence shows that the railroad track was perfectly straight from Conway to the point at which he was injured, and if he had looked he could have seen the locomotive at any point between Conway and that point. The injury was received between eight and ten o'clock in the daytime. The injury was received almost opposite the wood products plant, where the machinery made considerable noise in running while grinding up lightwood. The evidence shows at the time of the injury the locomotive, by which plaintiff was injured, was equipped with a pilot at each end, left Conway between eight and nine o'clock in the morning, on schedule time, as a regular scheduled train, in the direction of Myrtle Beach, that the day was clear. That the engineer was at his regular post, and conductor was in the cab of the engine, on the fireman's seat. That the fireman and flagman were sitting on tender at the front end of the locomotive, as it was running, for the purpose of looking out, according to the rules. The locomotive was running at a slow rate of speed, owing to the fact that a good many people were working around the wood products plant, where there was considerable noise. When the loco-

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motive, by which plaintiff was injured, left Conway, plaintiff was walking in the direction of Myrtle Beach, on the right of way of railroad, on the south side of the track, and had he remained here would not have been injured. If he had looked at all, immediately before he stepped on the track, there was nothing to prevent his seeing the locomotive approaching. But being on the right of way, and not on the railroad track when the locomotive had about reached him he stepped up on the track immediately in front of it, about twelve or fifteen feet south of the "hog" then being operated at the wood products plant. As he stepped on the railroad track the brakeman and fireman gave the alarm, which was heard by a bystander at some distance, but failed to attract plaintiff's attention. Plaintiff failed to heed the warning when given, and having failed to exercise ordinary care or precaution for his safety, he was struck and knocked in the ditch alongside the track. The evidence shows there was plenty of room between the ties piled on the right of way, and the track for him to walk without getting on the track. The evidence shows conclusively to my mind that the plaintiff's injury was due solely to his own carelessness and negligence in not exercising the slightest degree of care or taking any precaution for his safety. He had crossed two trestles in defiance of notice, that no one was permitted to do so. He was not going from one town to another town, he was not attempting to go from one public road to another public road. The place was not a populous community, but on the contrary, does not seem to have been settled at all, or any one living on the railroad. There was absolutely not a jot, or tittle of evidence, to support the assumption that the right of way and railroad track of the defendant at the location in question, had been dedicated to the public use and that the plaintiff, or any one else, had acquired the license to so use it. The undisputed evidence in this case shows that the defendant exercised more than ordinary good care at the place of

injury, the track was clear. There was no obstruction in the view. The train was running at a moderate speed. The evidence shows that the conductor and the engineer were looking out, two employees in addition to this were stationed in front of the locomotive, as it was then running, and these two gave at the first opportunity ample warning of his danger. The plaintiff, on the contrary, neglected to look or exercise any care and precaution whatsoever to avoid the danger. By looking he could have seen the locomotive, by listening he could have heard the moving of the locomotive, or warning given by the two employees of the defendant. The evidence shows that he did not even exercise slight care. He was not traveling at such a place as Mrs. Jones was in the case of *Jones v. Ry. Co.*, 61 S. C. 556, 39 S. E. 758. Nor does the case of *Carter v. Railway*, 93 S. C. 329, fit this case. In the Jones case the allegation and proof showed she lived in a populous section of Anderson, and she was injured at a place where the general public had been accustomed to walk for many years, and where men, women, and children had been accustomed to walk. In the Carter case the evidence showed that the public generally, for over twenty years, had walked the railroad between two small towns, and that the deceased was deaf and dumb. There is no proof in this case of any infirmity on the part of the plaintiff, either as to hearing or seeing. There was no proof in this case sufficient to show that the public had acquired by uninterrupted use for the statutory period and there was no evidence at all that any one had used the track previously for a crossing, at the point where plaintiff got on the railroad track and was injured. As was said by this Court in the case of *Cable Piano Company v. Southern Railway Co.*, 94 S. C. 143: "The law imposes upon every capable person the duty of observing due care for his own safety when about to cross the railroad track, which necessarily involves the exercise of his senses. And while it is ordinarily a question of fact for the jury to say

whether under the circumstances of the particular case the traveler did exercise such care, when the facts are undisputed and susceptible of only inference, it becomes a question of law for the Court." *Zeigler v. R. R.*, 5 S. C. 221; *Edwards v. Ry.*, 63 S. C. 271, 41 S. E. 458; *Bamberg v. Railway*, 72 S. C. 389, 51 S. E. 988; *Osteen v. Ry.*, 76 S. C. 378, 57 S. E. 196; *Drawdy v. Ry.*, 78 S. C. 379, 58 S. E. 980; *Griskell v. Ry.*, 81 S. C. 193, 62 S. E. 205. In the case at bar the plaintiff was injured, not at a public crossing, as was the case in *Cable Piano Company*, *supra*, but on a railroad track, not at a public crossing, but by his stepping on the track in front of an approaching locomotive, without exercising the slightest care for his protection by the exercise of his senses. By the exercise of his sense of sight, or hearing, the injury would have been prevented. The plaintiff did not look or listen for the train before stepping on the track. He failed to observe its approach; he disregarded the warnings of the employees in the engine, and the only inference that can be drawn from the evidence is that his own negligence was the sole cause of his injury. There is no proof that the injury was in any manner due to any actionable negligence on the part of the defendant railroad. The railroad company, as the evidence shows, did its full duty; it kept a reasonable lookout. It gave warning of the approaching of the train and observed ordinary care under the circumstances of the case to avoid injury to the plaintiff.

"One going on or near a railroad track is bound at his peril to make diligent use of his senses of sight and hearing, in order to detect the approach of trains, and a disregard of such duty, and a stepping on the track, without looking or listening, would be negligence, and if plaintiff had reason to believe that trains would be approaching, the fact that he was an employee did not release him from the necessity of exercising reasonable care, under the circumstances for his own safety, and that he had no right to rely wholly on

the railroad company to protect him from passing trains." *Illinois Cent. R. Co. v. Nelson*, Federal Reporter, May 29, 1913, page 957.

In my view of the case the judgment should be reversed, and complaint dismissed, as motion to direct for defendant should have been allowed, and it is unnecessary to consider the other exceptions, and for this reason I dissent.

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MCDANIEL v. GREENVILLE-CAROLINA POWER CO.

1. SALUDA RIVER—NAVIGABLE STREAMS.—By 5 Stat. 223, Saluda River is made a navigable stream to McElhaney's Ford.
2. NAVIGABLE STREAMS—DAMS—DAMAGES.—The legislature has the power to grant a private corporation the right to build a dam across a navigable stream, but it has no power to release it from liability for damages to a riparian owner above accruing years after its erection from mud, sand and sediment accumulating in the pond.
3. *IBID.*—*IBID.*—CONDEMNATION.—In such case the remedy by condemnation is not exclusive, but action may be maintained on the case in the Court of Common Pleas.

Before SHIPP, J., Pickens, February, 1913. Reversed.

Action by Luvicy D. McDaniel against Greenville Carolina Power Co. Plaintiff appeals.

Messrs. Ansel & Harris, for appellant, cite: *Authority by legislature to build a dam across a nonnavigable stream does not relieve from liability for damages*: 60 S. C. 265; 58 S. C. 560. *Legislature could only grant authority to build a dam across a navigable stream for navigation purposes*: 2 Am. R. 64; 40 Cyc. 565; 10 Wall. 497; 82 Am. D. 201; 36 N. J. L. 335; 5 Ohio 410; 16 Wis. 661; 13 Wall. 177; 76 S. C. 100; 9 A. S. R. 91; 52 Conn. 570; 17 Am. R. 459; 48 A. S. R. 941; Code 1912, 2139; 17

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Am. St. R. 459; 27 S. C. 146; 209 U. S. 452. *Plaintiff is not required to condemn*: 37 S. C. 387; 47 S. C. 464; 69 S. C. 481; 76 S. C. 98; 79 S. C. 431; 69 S. C. 185; 40 Cyc. 581; 21 A. S. R. 740; 23 At. R. 1050; 50 A. S. R. 502; 77 S. E. R. 926.

Messrs. Haynsworth & Haynsworth, Carey & Carey and Osborne, contra.

Messrs. Haynsworth & Haynsworth cite: Landowner is confined to condemnation: 37 S. C. 385; 58 S. C. 544; 47 S. C. 464; 77 S. E. 926. *The authority to erect the dam affords full protection*: 23 N. Y. 42; 35 N. Y. 520; 99 U. S. 635; 166 U. S. 269; 179 U. S. 141; 204 U. S. 364; 17 L. R. A. 631; 12 L. R. A. 677; 69 Fed. 324; 14 Pac. 613; 53 S. C. 575; 34 S. C. 62; 71 S. C. 156; 83 S. C. 315. *If the river is navigable, negligence should be alleged*: 76 S. C. 320.

July 22, 1913. The opinion of the Court was delivered by

MR. JUSTICE WATTS. This action was brought to recover damages. The complaint alleges that in 1907 the defendant power company erected across Saluda River a dam, which obstructed the natural flow of sand and water in the channel, causing the channel to fill with sand and mud, and thus causing the plaintiff-appellant's land, lying above the dam, to be overflowed with mud, and sand, and water. There is no allegation that the dam was wrongfully or negligently constructed. The respondent interposed a demurrer to the complaint on the ground that the same did not state facts sufficient to constitute a cause of action "in that the defendant was authorized by the statutes of this State to construct the dam in question across Saluda River, which is navigable at said point, and inasmuch as the

complaint does not charge that the said dam was negligently constructed."

His Honor, Judge Shipp, sustained the demurrer, and dismissed the complaint, and from this order appellant appeals and by eleven exceptions questions the correctness of this ruling. The first three exceptions question

1 the correctness in holding that the acts of the legislature of this State make Saluda River a navigable stream. These exceptions are overruled, as the act of the legislature declare Saluda River to be a navigable stream as far up as McElhaney's Ford. Act of December 16, 1797, vol. 5, page 322, and it is conceded that McElhaney's Ford is several miles above the land alleged to be damaged.

The other exceptions raise the question that the building of the dam, even under authority of the legislature, did not excuse or exempt it from liability for damages to riparian landowners above the dam for injuries done

2 to their land by reason of the erection of the dam, and that the legislature only had the power over the stream to allow dams and locks built for navigation purposes, and that the respondent is a private corporation engaged in the business of generating electric power for sale, and liable for all damages done to lands above it which naturally flow from the erection of the dam, even though the act of the legislature authorizing the building of the dam did not provide for such compensation. We think these exceptions should be sustained. The legislature had the authority to authorize and allow the respondent to build the dam in question across Saluda River, which had been declared to be a navigable stream, but it had no right to give them the power to build the dam and exempt from liability to any landowner on the stream, either above or below the dam, that might suffer any injury to their property by reason of the erection of the dam, even though by authority of the State. They could only be permitted to put the dam across the river, and if by so doing they

injured any landowners on the stream, they should be required to respond in damages for such injury. If in the erection of the dam they exercised the highest degree of care and were in no manner negligent, and conducted it in the most skillful manner, yet, if by the building and maintenance of the dam they injuriously affect their neighbors, they are liable in damages. In other words, the legislature has the right to grant permission to erect the dam, and respondent had the right to build and maintain the dam, yet, if by so doing they injure the landowners on the stream, and the erection and maintenance of the dam is the direct and proximate cause of the injury to the landowners, they must pay damage, otherwise it would deprive property holders of their property and take it from them without compensation, and would be unlawful, unjust, and contrary not only to all law, but all reason and justice. It may be that when a dam is first built that it will not injuriously affect land some distance from it, and for a long time there will be no cause for them to complain, but when the pond, made by the dam, fills with mud, sand, trash, and other things, causes overflows and injury to lands, then the party injured has a cause of action, if the building and maintenance of the dam is the direct and proximate cause of their injury. The complaint in this case alleges that the water from this dam backed up on her lands, and overflowed them with water, mud, sand, and other deleterious deposits. The complaint states a good cause of action. The fact that respondent's act in building the dam was sanctioned by the State, and it did it under authority of law, and committed no fault in the erection of its dam, does not relieve it, if by so doing it injures or destroys other people's property without compensating them. I know of no law that will permit a corporation, or an officer thereof, even though he is authorized by the State, to take the property of an individual for any purpose whatsoever, however beneficial it may be to the public, without compensation, such pretended

authority would be void and could afford no protection to any one. If the appellant has been injured as a natural result by the erection and operation of this dam and the operation of the same is the direct and proximate cause of injury to her land, then she is entitled to such damages as would compensate her for such injury.

My views are that it does not make any difference whether Saluda River is navigable or not, the same rule of damages flows as laid down in *Ward v. Ford*, 58 S. C. 560, 36 S. E. 916, and *White v. Manf. Co.*, 60 S. C. 265, 38 S. E. 456. When the dam in question was erected the waters from the pond in no manner affected appellant's land. She was at that time in no manner affected, and could not foresee that later she would suffer damage, and for that reason could not demand compensation, for she then suffered no injury, and any claims made would have been conjectural and speculative on her part, but when she suffered injury from the erection and operation of the dam in question, then, and not until then, did a cause of action accrue to her, and not until then was she in a position to maintain an action. Any action brought by her until her rights were injuriously affected, or her rights invaded, would have been premature, and she would have had no status in Court.

"The legislature has no power under the Constitution to make over to any individual or corporation any right save those of the public, without securing a just compensation." *Lee v. Pembroke Iron Co.*, 2 Amer. R. 64.

"The rights of a riparian proprietor on a navigable stream are substantially the same as those attaching to riparian ownership on a nonnavigable watercourse, except that in some respects they are enlarged by the greater size and capacity of the stream and that there are some additional privileges connected with its navigable character. Such an owner has the right of access to the navigable part of the stream from the front of his lot, and provided he

does not impede or obstruct navigation to build private wharves, landings or piers, or use the water of the stream for any purposes." 40 Cyc. 565; *Yates v. Milwaukee*, 10 Wall. 497.

"While a dam in a navigable stream, if authorized by the act of the legislature, cannot be indicted as a public nuisance for obstructing the stream, still the act is no protection against injuries to a private owner." 8 Amer. and Eng. E. Law 704.

"In the case of a private stream, no one would doubt the right of an injured owner to maintain an action for the damage suffered by him by reason of a change in the current. But one has no more right to injure another with the water of a navigable stream than with that of a nonnavigable, private stream." *Fulmer v. Williams*, 122 Penn. St. 191.

"The right of the State to improve the stream as a highway and for the purpose of aiding its navigation is superior to the rights of the riparian owners. It may take and direct absolutely and without compensation so much of the water of the stream as may be required to improve its navigation. But that is the limit of its right." *Green Bay Co. v. Hankavan W. P. Co.*, 90 Wis. 370.

It was held in *State v. Columbia Bridge Co.*, 27 S. C. 146, 3 S. E. 55, "that the riparian proprietor had title to the soil covered by the stream as far as the center of the stream, subject to the right of the public to use of the stream for transportation as a highway, when such streams are navigable or may be made so by the removal of obstructions."

To allow the respondent to escape paying compensation to the appellant, if appellant has been injured as she alleges in her complaint, would nullify and wipe out article I, section 17, of the Constitution of 1895. We have no doubt that the respondent should be liable for all damages, if any, caused by the building of said dam, even though they were

authorized to build. We think that the order appealed from should be reversed.

We are of the opinion that the complaint alleges a wrongful trespass upon the lands of the appellant, and invasion of her rights. The Court of Common Pleas has jurisdiction to try such cases, and even where condemnation is

3 the proper procedure, it is tried in that Court, and an order must be first obtained from the resident Circuit Judge, and from the first finding appeal may be had to Court of Common Pleas. We see no reason why the issues as made in this case cannot be tried in the Court of Common Pleas, as in other cases of trespass and damages. The appellant alleges she has been damaged for the wrongful invasion of her property right by the respondent, and demands damages as compensation. The respondent denies that she is entitled to compensation. The issues as made are simple and should be disposed of in the Court of Common Pleas, without having to resort to the statute providing for condemnation proceedings. Appellant's counsel at the hearing stated that they did not care whether they had to seek damages under the condemnation statute, or proceed in the case, as made out by the pleadings in the Court of Common Pleas. This Court is of the opinion that even if appellant could have pursued the course granted by the statute in condemnation proceedings that remedy was not exclusive in this case, and appellant not necessarily limited to that remedy.

The judgment is reversed, and case remanded for new trial.

THE CHIEF JUSTICE *concurs*.

MR. JUSTICE FRASER *concurs in the result*. The act of incorporation gives a right of action for injury, not for negligence. The defendant can not escape liability by pleading its own wrong in failing to condemn.

MR. JUSTICE HYDRICK, *concurring in the result*. The sole question made by the demurrer, and, therefore, the only question properly before this Court, is, whether the complaint failed to state a cause of action in failing to allege that defendant's dam was negligently constructed. The complaint was not demurrable for that reason, because the act authorizing the construction of the dam imposes upon the corporation liability for damage caused thereby to riparian owners. True, such liability is not imposed in express terms, but it is by necessary implication; if not, why was the power of condemnation conferred upon the corporation? And why was the express provision inserted in the act, that any landowners should have the right to sue for and recover, even after condemnation, such damages as might thereafter accrue which were not considered or contemplated by the appraisers in condemnation proceedings? No doubt the legislature had in mind the possibility, under the well known natural law of running waters, that damages might accrue many years after the building of the dam, by the deposit of sediment in the bed of the stream and the consequent raising thereof, which could not be foreseen with reasonable certainty at the time of condemnation. Therefore, notwithstanding the authority to build the dam conferred upon the defendant by the statute, the plaintiff is entitled to compensation for any damage to her land caused by the dam.

It is unnecessary, therefore, to decide in this case, the other questions discussed in the opinion, and, as they are questions of some gravity, and, as they have not heretofore been decided by this Court, I prefer to reserve my opinion.

The defendant should not be allowed to shift ground and contend here—a point not raised or decided on circuit—that the complaint is demurrable because the remedy by condemnation, afforded by the statute, is exclusive.

For these reasons, I concur only in reversing the order sustaining the demurrer.

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BISCHOFF v. ATLANTIC REALTY CORPORATION.

WILLS—LIMITATION OF ESTATES—FEE DEFEASIBLE.—In a will providing in one clause that “all the rest and residue of my real estate * * * I give and bequeath unto my beloved wife * * * that is to say during her natural life * * * and after her death * * * to be equally divided between my * * * children,” naming them, and in the following clause: “In case any of our children should die and not leave any issue living then his or her share or part shall be equally divided between our children then living or their issue * * * the issue, if any, are entitled and receive the parent part,” the word “then” in the last clause refers to the dying of the children of the testator at any time. Cases considered.

Blum v. Evans, 10 S. C. 56, held to have been overruled by *Marshall v. Marshall*, 42 S. C. 436.

MR. JUSTICE FRASER *dissents*.

Before DEVORE, J., Charleston, April, 1913. Reversed.

Controversy without action by Albert Bischoff, Anna M. S. Hessemann, J. Edwin Bischoff, and Julia W. Otzen against Atlantic Realty Corporation. Defendant appeals.

The will in question is:

“The State of South Carolina, In the Name of God, Amen.

“I, Albert Bischoff, of the city of Charleston, S. C., and State aforesaid, being of sound mind and memory, and considering the uncertainty of this frail and transitory life, do therefore ordain, publish and declare this to be my last will and testament in the following manner:

Item 1st. “I will and direct that my funeral expenses, and all my other just debts be paid immediately after my death, or as soon thereafter as it can conveniently be done, without making any unnecessary sacrifices for that purpose.

Item 2d. “All the rest and residue of my real estate and personal property whatsoever, I give and bequeath to my beloved wife, Anna Martha Bischoff; that is to say, to enjoy the income thereof, after tax, insurance and repairing of

buildings is paid, during her natural life, for her and her children support and for the education of our beloved children, and after her death the whole real estate and personal property, to be equally divided between our beloved children, share and share alike, viz.: Anna Matilde, Albertine, now married to John Godfried Steenken in Brooklyn, Julia Wilhelmine, Martha Caroline, Anna Matilda Sophia, Carl William, John Godfried, and also if we should have any more born after this my last will and testament is made, all shall share alike.

Item 3d. "In case any of our children should die, and not leaving any issue living then his or her share or part, shall be equally divided, between our children then living, or their issue share and share alike, the issue if any are entitled and receive the parent part.

Item 4th. "It is my will that my executrix and executor hereinafter named keep together my real estate, and rent or lease the same to the best advantage, and use the same or the net proceeds as hereinabove stipulated.

Item 5th. "It is my will in case my dear wife, the said Anna Martha Bischoff, should be dissatisfied with the written stipulation of disposition of my estate, she shall have the full power and right to waive and relinquish her claim stipulated herein, and when that is done to have her full claim to her dower in or to said property according to the statute and regulation and law of the State of South Carolina, which the Judge of the Probate will then decide in Charleston, S. C.

Item 6th. "It is my will that my executrix and executor shall invest my personal property in real estate, bond or mortgage, or other good security, according to their own best judgment, excepting household furniture, my dear wife has the full right and power to do with it as she may like best.

Item 7th. "I nominate, constitute and appoint my dear wife, Anna Martha Bischoff, my executrix, and John God-

fried Steenken my executor, of this my last will and testament, in witness whereof I have hereunto set my hand and seal at Charleston, S. C., April (25th) twenty-fifth (1873) eighteen hundred and seventy-three.

Albert Bischoff [L. S.]”

The Circuit decree is:

“This is a controversy without action submitted to me by the attorneys representing the parties hereto for construction of the will of the late Albert Bischoff.

“The testator devises his property by said will, to his wife, Anna Martha, for life, and after her death directs the whole property to be equally divided between beloved children, naming them, share and share alike, with provision that if any children should be born after his will, all should share and share alike. The life tenant is dead and this provision of his will, if not qualified in any way, would give to the plaintiffs in this case under the facts presented to the Court a fee simple title to the property in question.

“The testator, however, goes on to say in item 3d of his will: ‘In case any of our children should die, and not leaving any issue living then his or her share or part, shall be equally divided between our children then living, or their issue share and share alike, the issue if any are entitled and receive the parent share,’ and the question has been made as to whether the testator intended the first clause in said item to mean, in case any of his children should die prior to the death of the life tenant, thus giving the plaintiffs a fee simple title in said property, or whether he intended to mean in case any of his children should die *at any time* not leaving issue, thus giving them a fee defeasible on their death without issue.

“There are two principles which the Supreme Court has laid down in construing wills of this kind:

First. “That the law favors an early vesting of estates and abhors perpetuities, restrictions and hindrances to enjoyment of estates. *Durant v. Nash*, 30 S. C., p. 192.

Second. "That when a gift is made in one clause of a will in good and unequivocal terms, the quantity or quality of the estate should not be cut down or qualified by words of doubtful import found in a subsequent clause. *Walker v. Anderson*, 87 S. C., p. 60; *Smith v. Smith*, 93 S. C., p. 216.

"With these principles in mind, let us look at certain cases decided by our Supreme Court. In *Pressly v. Davis*, 7 Rich. Eq., p. 105, testator devised his property to *six children* and says: 'If any of the aforesaid children should die or make their exit *without lawful issue*, then *their portions* are to be equally divided among the remainder of the aforesaid children.' The Court held that the testator meant if any children should die *in lifetime* of testator.

"In *Vidal v. Verdier*, Speer Eq., p. 402, testator gives property to wife for life, and at her death to nephew, Jas. F. Vidal, but in case he die without leaving a lawfully begotten child, *then and in that case* the whole shall be divided among the rest of my nephews, etc. Held that Jas. F. Vidal, having survived the life tenant, took a fee simple.

"In *Blum v. Evans*, 10 S. C., p. 56, the devise was to wife for life and at her death to daughter, 'Should my daughter die without issue I wish my entire estate to be divided equally among the Horlbecks, etc.' Court held that daughter having survived the mother became vested with a fee simple title. In this case the act of 1853 was in force so that with this language in mind, the will would read 'Should my daughter die without issue living at the time of her death, then I wish my estate divided, etc.'

"The case at bar says: 'In case any child should die and not leave any issue living then his share shall be divided between our children *then* living.' Does the word 'then' add any new meaning? I do not think so. *Mangum v. Piester*, 16 S. C., p. 329, says the word 'then' 'has no power in itself to fix a time, it simply refers to a time already

fixed, etc., etc.' It seems to me that the principle in the case at bar is exactly involved in the case of *Blum v. Evans*. The case of *Mangum v. Piester*, 16 S. C., p. 316, can have no weight here as that involved a will prior to 1853 and it held that this clause was void as it meant an indefinite failure of issue. The Court in that case, at page 320, refers to *Blum v. Evans*, and says it was decided in the light of the act of 1853.

"The case of *Marshall v. Marshall*, 42 S. C., p. 436, is interesting. The testator there gives property to wife for life with remainder to sons, W. and J., and by later clause directed that if W. and J. die leaving no children to *inherit* this land the same shall be sold and proceeds divided, etc. The Court held that this clause meant dying at any time. Here the Court reviews the previous authorities and draws the distinction between this case and that of *Blum v. Evans*, etc., and holds that where testator uses such words 'as in case of,' etc., showing that he intended a substitution of parties in place of first takers, the words 'dying without issue' would be referred to a time prior to death of testator or of life tenant, but where no such intended substitution was shown, as where he directed the land sold and proceeds divided, that it would be referred to the death at any time.

"In the case at bar, the testator used the expression 'in case any of our children should die, etc.,' and directs how the shares 'shall be divided.'

"It seems to me that the testator clearly intended to give his estate to his children after the death of his wife in fee simple. This is evident by clause two of his will. It then occurred to him that possibly some of his children might not be alive at the period that he had fixed for distribution, to wit: the death of the life tenant, and he therefore says, 'in case any of them should die not leaving issue, etc.,' clearly, to my mind, intending that the others should take by way of substitution in case any of his children should not be alive at the time of the death of the life tenant.

"This seems to be evident, because if the testator intended that his children should not have a fee simple in the property he did not accomplish his purpose, because under such a construction he provided that if any of his children should die without issue, then such a child's share would go to the others in fee simple, thus making complications arise on the death of any child without issue as a portion would be held by the others in fee simple and the other portion held in fee defeasible.

"Taking, therefore, the will as a whole, and endeavoring to make all portions of same consistently harmonize, I think it was the intention of the testator in item 3d to provide for the contingency of any of his children dying prior to the time of distribution, to wit: the death of the life tenant, and I so hold.

"It is, therefore, ordered and decreed that the plaintiffs herein be adjudged under the terms of the will of the said Albert Bischoff to own a fee simple in the real property of which the late Albert Bischoff died seized and possessed, and in the absence of any questions other than those arising under the construction of said will, can convey a good and marketable title to the defendant to the premises described in the agreed case herein."

Messrs. Nathans & Sinkler and James Simons, for appellant, cite: 87 S. C. 60; 7 Rich. Eq. 105; Speer's Eq. 402; 10 S. C. 56; 42 S. C. 440; 16 S. C. 316; 42 S. C. 436.

Messrs. VonKolnitz & VonKolnitz, Ficken & Erckmann, and *J. K. P. Bryan*, contra.

The two former cite: 87 S. C. 60; 93 S. C. 216; 30 S. C. 192; 6 Rich. Eq. 83; 7 Rich. Eq. 105; Speer Eq. 402; 10 S. C. 56; 16 S. C. 316; 42 S. C. 436.

Mr. Bryan cites, in addition: 7 Rich. Eq. 105; Theobald on Wills, 7 Ed. 659; 7 W. R. 541.

July 24, 1913. The opinion of the Court was delivered by

MR. CHIEF JUSTICE GARY. This is a controversy without action, under sections 413 and 414 of the Code of Procedure, for the purpose of determining whether the plaintiffs who entered into an agreement with the defendant to sell the land described in the complaint, have such a marketable title, as the defendant is bound to accept.

Albert Bischoff departed this life, leaving of force his last will and testament, the second and third items of which are as follows:

Item 2d. "All the rest and residue of my real estate and personal property whatsoever, I give and bequeath unto my beloved wife, Anna Martha Bischoff, that is to say, during her natural life, and after her death, the whole real and personal property to be divided equally, between my beloved children, share and share alike, viz.: (naming them)."

Item 3d. "In case any of our children should die and not leave any issue living, then his or her share or part shall be equally divided between our children then living or their issue, share and share alike, the issue if any are entitled and receive the parent part."

The question submitted to the Court was: "Whether or not under the terms of said will, the testator intended the first clause in item third to mean, in case any of his children should die at or prior to the time of the death of the life tenant, or whether or not he intended the said clause in said item to provide, in case any of his children should die at any time and not leaving issue, etc., and whether or not, under the terms of said will, the plaintiffs in this case (who survived the life tenant) have a fee simple title."

His Honor, the presiding Judge, in concluding his decree, thus ruled:

"Taking, therefore, the will as a whole, and endeavoring to make all portions of same consistently harmonize, I think it was the intention of the testator in item 3d, to

provide for the contingency of any of his children dying, prior to the time of distribution, to wit: the death of the life tenant, and I so hold."

The defendant appealed, and said conclusion is assigned as error.

Section 3551, Code of Laws (1912), and known as the act of 1853, is as follows: "Whenever in any will of a testator, hereafter dying, an estate either in real or personal property, shall be limited to take effect, on the death of any person without heirs of the body, or issue, or issue of the body, or other equivalent words, such words shall not be construed to mean an indefinite failure of issue, but a failure at the time of the death of such person."

The words, "The issue if any are entitled and receive the parent part," refer solely to the manner of distribution and were intended to indicate that the share of a child dying without issue, should be divided between the testator's children then living, and the issue of testator's children then dead, *per stirpes* and not *per capita*.

The third section of the will must be read, as if the provisions of section 3551, Code of Laws (1912), were incorporated in it, which would then read as follows:

"In case any of our children should die, and not leaving any issue living at the time of the death of such person, then his or her share or part, shall be equally divided between our children then living, or their issue, share and share alike, the share of a child dying without issue living at the time of the death of such person, to be divided between the testator's children then living, and the issue of the testator's children then dead, *per stirpes* and not *per capita*."

The Court thus construed the word "then" in *Mangum v. Piester*, 16 S. C. 316: "The word, as an adverb, means 'at that time,' referring to a time specified, either past or future. It has no power in itself to fix a time. It simply refers to a time already fixed. The question here is: What

time do the words 'dying without issue' unqualifiedly fix? Do they fix an indefinite period, when there shall be no issue, or do they fix a definite period, to wit: the death of W. B. Griffin? They must have been used with reference to one or the other, and, having been thus used, the adverb *then* following them, would refer to the one or the other as their proper construction might indicate as the time intended. To assume that the use of the word would, in itself, fix a certain time, and then refer to it, would be giving it a double significance, of which it is not susceptible."

The only reasonable construction of the word "then" in the 3d clause of the will, is that it had reference to the words "dying without issue living at the time of the death of such person," thus precluding the idea that it had reference to dying without issue in the lifetime of the life tenant.

The leading case upon which the respondent's reply, is *Vidal v. Verdier*, Speer's Eq. 402, in which the devise was as follows: "I give, devise and bequeath unto my beloved wife, Sarah Bennett, the use of all and singular my estate, both real and personal, whatsoever and wheresoever, during her natural life, and after the death of my beloved wife, Sarah Bennett, I leave to my nephew, James Felix Vidal, the whole of my estate, both real and personal; but in case of the death of my nephew, James Felix Vidal, without his leaving a lawfully begotten child, or children, then and in that case, the whole, both real and personal, be divided among the rest of my nephews and nieces, share and share alike. And be it further understood, that in case of the death of my nephew, James Felix Vidal, leaving a lawfully begotten child, or children, then and in that case, the whole property, both real and personal, shall be divided between them, share and share alike." * * *

The last sentence thereof, is what specially distinguishes that case from the one now under consideration.

The case of *Vidal v. Verdier*, Speer's Eq. 402, was thus explained by Chancellor Harper (who wrote the opinion in that case), in *Yates v. Mitchell*, 1 Rich. Eq. 265:

"That case was decided on this principle—that when a testator, giving in remainder after an estate for life, uses one set of expressions, denoting that the remainderman is to take an absolute estate—and another set of expressions limiting him to an estate for life, with remainder to his issue, and a limitation over in the event of not having issue; this apparent repugnancy may be reconciled, by 'restricting the dying without issue, to the lifetime of the tenant for life, thus permitting every part of the will to have its proper effect. If he dies during the lifetime of the tenant for life, leaving issue, the issue will take as purchasers under the will—if without issue, the limitation over will have effect; but if he survives the tenant for life, the estate is absolute. Such is, in every case, a reasonable and probable intention; and in that case, there were circumstances, to satisfy me very fully, that such was the actual intention."

He then proceeds as follows, to show the difference in the case then under consideration, and that of *Vidal v. Verdier*, Speer's Eq. 402:

"But this has nothing to do with the case before us—though in another and peculiar sense, different from that in which the words are used in *Vidal v. Verdier*, the devisee, in one event, is said to be restricted by the terms of the will to a life estate. It enters into the very definition of an executory devise, that a fee simple or absolute estate may be given, with a provision that it shall determine and go over on a future contingency—most commonly, the contingency of dying without leaving issue; and this is what is very clear in the present instance. The testator devises to his children 'their heirs, executors, administrators and assigns forever.' He gives an absolute estate, and an absolute estate only—though, to be sure, it may be said that in one event it turns out to be no more than a life estate.

In a sense still somewhat different, every man may be said to have only a life estate in any of his property. *In the present case, if the devisee had left issue, his estate would have been absolute, so that he might dispose of it at his pleasure, to his issue or any one else. In Vidal v. Verdier, on any other construction than that which was adopted, he could have had an absolute estate in no event whatever.*" (Italics added.)

In *Marshall v. Marshall*, 42 S. C. 436, 20 S. E. 298, the Court had under consideration the will of John Marshall, which contained these clauses:

3d. "I leave to my beloved wife her lifetime, the plantation whereon I now reside." 6th. "I give to my beloved sons, Wm. K. and John W. Marshall, at the death of my wife, the residue of my land, being the plantation whereon I now live, commencing at the Hickory corner mentioned in Robert's track to extent of my land boundary west of the Potter road, the same to be equally divided between them, giving John the side next to W. W. Bell's, with these considerations, that each one pay to me or my executors the sum of sixteen dollars yearly, commencing on the first of January, 1849, for the support of myself and wife during my lifetime, and the lifetime of my wife, should she outlive me, they refusing to comply with said terms, forfeit so much out of the said lands so given them, and by their compliance, I give said parcels of land to them and their heirs forever." 11th. "Should my son, John W. Marshall, die, leaving no children to inherit the land left him by me at his death, it is my desire, and I leave it as my will, that the parcel of land so left him by me, be sold and the proceeds be equally divided between my son, Samuel, and my three daughters, Mary, Susan and Sarah, or their heirs."

Chief Justice McIver, who delivered the opinion of the Court, thus states the question then under discussion:

"The practical inquiry is, whether the testator intended by the words which he has used in the eleventh clause of

the will, that the fee previously given to John W. Marshall by the sixth clause of the will, should be defeated by his death without children, during the lifetime of the widow, or by his death without children, at any time when that event should occur; for both parties concede, and the Circuit Judge so holds, that John took a fee defeasible upon the happening of one or the other of said contingencies."

He then proceeds as follows to comment on the cases of *Vidal v. Verdier*, 1 Speer's Eq. 402, and *Yates v. Mitchell*, 1 Rich. Eq. 265.

"In *Yates v. Mitchell*, 1 Rich. Eq. 265, the testator gave one moiety of the annual income of his estate to his wife for life, and the other moiety to his children during the life of his wife, and then provided that after the death of his wife, his estate should go to his children in fee (and should any of my said children die without leaving lawfully begotten issue, living at the time of his, her, or their death, then the share or shares in my estate of such child or children, so dying as aforesaid, shall go to the survivor or survivors of my said children, and to the issue of such of my said children, as may have previously died). It was contended that upon the death of the widow, the estate of a child who survived her became absolute, and the case of *Vidal v. Verdier*, *supra*, was relied upon to support that view, but the Court held that that case did not apply, and upon the death of any of the children, at any time, without issue, the share of the child so dying would go over to the survivors. It seems to us that *Yates v. Mitchell* is much more like the present case than *Vidal v. Verdier*."

After quoting the language of Chancellor Harper in *Yates v. Mitchell*, 1 Rich. Eq. 265, explanatory of *Vidal v. Verdier*, Speer's Eq. 402, he then says:

"It is very obvious that the case of *Vidal v. Verdier*, thus explained, cannot control the present case. For here there are two sets of expressions—one denoting that John W. Marshall was to take an absolute estate, and the other limit-

ing him to an estate for life, with remainder to his issue, and a limitation over upon failure of issue. On the contrary, it is clear that John W. Marshall, by the sixth clause, took an estate in fee simple, after which there could be no remainder to his issue; but by the operation of the eleventh clause, such fee became defeasible upon his death without children, whenever that event might happen. *Carson v. Kennerly*, 8 Rich. Eq. 259; *Thomson v. Peake*, 38 S. C. 440. The case of *Blum v. Evans*, 10 S. C. 56, resting mainly, if not entirely, upon *Vidal v. Verdier*, need not be considered."

In the case of *Mangum v. Piester*, 16 S. C., Chief Justice Simpson, who delivered the opinion of the Court, used the following words, after quoting the explanatory language of Chancellor Harper in *Yates v. Mitchell*, 1 Rich. Eq. 265, in regard to the doctrine announced in *Vidal v. Verdier*, Speer's Eq. 402: "But he said further, that this had nothing to do with the case he was then discussing, because in that case there was not a double set of expressions indicating different estates conveyed as in *Vidal v. Verdier*."

These authorities clearly establish the doctrine, that unless there are two sets of expressions, one denoting that the remainderman is to take an absolute estate, and another set of expressions limiting him to an estate for life *with remainder* to his issue, and a limitation over in the event of his not having issue, the rule announced in *Vidal v. Verdier*, Speer's Eq. 402, can not be successfully invoked, as it was only intended to be applied when there was a necessity to reconcile the apparent repugnancy, by restricting the dying without issue, to the lifetime of the tenant for life, and thereby permitting every part of the will to have its proper effect.

In the case of *Vidal v. Verdier*, Speer's Eq. 402, James Felix Vidal was given an absolute estate after the death of the life tenant. It was subsequently provided that if he died without leaving a lawfully begotten child or children, then and in that case, the whole property, both real and

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personal, be divided among the rest of his nephews and nieces, share and share alike. So far no valid objection could be urged to the provisions of the will, as it is not an *inconsistency*, but only an instance of that which commonly arises, when an executory devise or a contingent or substitutional limitation is created.

A different principle, however, prevails when there is a repugnancy between those provisions giving a fee in the first instance, and those subsequent provisions which destroy it, or cut it down to a life estate. The will subsequently provided that in case of the death of James Felix Vidal, leaving a lawfully begotten child or children, then and in that case, the whole property, both real and personal, was to be divided between them share and share alike. It will thus be seen, that if he died without issue, the property was to go to others, and that if he died leaving a child or children, the property was to go to them. Therefore it was certain that he could not, in either event, enjoy more than a life estate. It was with a view of reconciling this repugnancy that the Court in that case, restricted the dying without issue to the lifetime of the tenant for life.

In the case of *Marshall v. Marshall*, 42 S. C. 436, 20 S. E. 298, the will did not provide that the property should go to the issue of John W. Marshall, and this is the distinguishing feature between that case and *Vidal v. Verdier*. The case under consideration comes within the doctrine announced in *Marshall v. Marshall*, *supra*.

We proceed, lastly, to consider the case of *Blum v. Evans*, 10 S. C. 56, in which the provisions of the will were as follows:

"I give to my beloved wife my entire estate, real and personal, during her lifetime, under the control and management of John Horlbeck and G. W. Dingle, as trustees, substitutions to be made by the Court and approved of by the parties interested.

"I wish my wife to enjoy this estate during her life; at her death to go to my daughter, Emma Julia. Should my daughter die without issue, I wish my entire estate to be divided equally among the Horlbecks (my wife's family) and the Blums (my family), one-half to the Horlbecks, one-half to the Blums."

It will thus be seen, that the facts were similar to those in *Marshall v. Marshall*, 42 S. C. 436, 20 S. E. 298, and not to those in *Vidal v. Verdier*, Speer's Eq. 402, in this important particular, to wit: That if the testator's daughter, Emma Julia, to whom he gave an absolute estate in the first instance, had issue living at the time of her death, *the property was not to go to such issue*. There were no express words conferring such right upon the issue, nor was that a case, in which they could take by implication. *Shaw v. Erwin*, 41 S. C. 209.

The doctrine announced in *Vidal v. Verdier*, was therefore incorrectly applied in *Blum v. Evans*.

While, as already stated, the facts in the last mentioned case were similar to those in *Marshall v. Marshall*, and entitled the parties to similar relief, the conclusions were different. We must, therefore, regard the case of *Blum v. Evans* as practically overruled by *Marshall v. Marshall*, which was a later case.

Judgment reversed.

MESSRS. JUSTICES HYDRICK and WATTS concur.

MR. JUSTICE FRASER, *dissenting*. I can't concur in the opinion of the majority of the Court in this case, and would not do so unless I felt impelled by indisputable authority.

I think that the Circuit decree ought to be affirmed upon the authorities and for the reasons therein stated.

It would not be profitable to compare the cases and review them all. While it is true that certain words have received judicial construction, yet it is a rule which is applicable to

the construction of every will, that the intention of the testator shall govern.

I know that the word "intention" is a term of art and signifies the meaning of the words there used, and does not refer to the purpose which the testator may have had in his mind. Applying this fundamental rule of construction, the question is, what estate is given to the children of Mr. Bischoff in his will? Without attempting to cite the will in full, which will appear in the case, and to which reference can easily be made, we find that he provided in the first clause of his will for the payment of his funeral expenses and just debts.

In the second clause of his will he gives all of his property to his wife, not merely to his wife, but to the individual, Anna Martha. She is to hold the property during her natural life for her and "our" children's support, and for the education of our beloved children, and after her death the whole real estate and personal property to be equally divided between our beloved children, share and share alike. The children do not take as a class, but he names them—Anna Matilda, Albertine, Julia Wilhelmine, Martha Caroline, Anna Matilde Sophia, Carl William, John Godfried, and then he provided in general terms for any other children who might thereafter be born. Up to that point the children unquestionably take a fee in remainder. Unfortunately he adds item 3, in which he says: "In case any of our children should die and not leaving any issue alive, then his or her share or part shall be equally divided between our children then living, or their issue, share and share alike. The issue, if any, are entitled and receive the parent's part."

Item four provides that the estate shall be kept together. Item five provides that if the wife, Anna Martha, should be dissatisfied with the provision he had made for her, she could then, at her option, take her share under the statute.

Item six provides that the executrix and executor "shall invest my personal property in real estate, bond and mort-

gage, or other good security, according to their own best judgment."

If there is anything clear in this will it is that Mr. Bischoff loved the persons named, and, with the highest sense of conjugal and parental love, attempted to provide for the specific objects of his bounty, and he calls them by name.

The opinion of the majority of this court, while not depriving the widow of her advantages, almost absolutely destroys the interests of the children. The children, it is held, take a fee defeasible upon their dying without issue. The issue of the children take a fee. Mr. Bischoff provides that the income from his estate shall be used for the education and support of his children. The unknown grandchildren take the property itself. The children whom he knew by name and loved will be entitled to their bare support after they have received their education. They are entitled to their support and nothing more until the day of their death. The estate can never vest in them, can never be subject to their control, and upon the judgment of the executor or executrix, as to what is a reasonable amount for their support, they must depend.

The Circuit decree misquoted section 3. It does not say "in case our children should die not leaving issue," it says "in case our children should die and *not* leaving issue." Our children will die, every one of them. There is no contingency about that. There *was* a contingency as to whether our children all, or any of them, would die before the life tenant.

It seems to me that as the time for distribution is fixed at the time of the death of the life tenant, and there are no restrictions upon their taking, those who take, take a fee.

It is conceded that the word "then" refers to the time fixed. The only time fixed in the whole will is the time of the death of the wife. Now substitute for the word "then"

the fixed time we have if any of our children be dead, at the time of the death of my wife, the issue, if any, shall take; if there be no issue of a predeceased child, then those who survive my wife shall take, the issue of a deceased child to represent the parent. What estate shall they take? The will is silent, and the statute says a fee.

By this construction the issue of children take now in fee simple, while the children, the immediate objects of his bounty, take a fee defeasible.

So entirely free is this testator from a foolish pride, in keeping up a family estate to descend from generation to generation, that in item four he gives power to the executrix and executor to rent or lease the real estate and use the same, or the net proceeds as hereinabove stipulated. That is to say, if it becomes necessary for the education and support of the persons named, to use the *corpus* itself, it shall be used.

It will be further observed that Mr. Bischoff says *who* shall take, not *how* they shall take. He limits the estate of the wife to a life estate. There is nothing in this will which is inconsistent with a fee in those who shall take at the death of the life tenant and under the statute that makes a fee.

It will be observed further that Mr. Bischoff refers to money, and can it be that he intended that his children should have anything but a fee in the money? And yet there is no distinction between money and land, and as they take the money they take the land. But they do not take the money or the land.

Item four provides (subsequent to item three, and controlling it) that his executrix and executor "hereinafter named" shall keep together his real estate and rent or lease the same to the best advantage, and use the same or the net proceeds as hereinabove stipulated, that is, for the education and support of the children.

Item six provides that the executrix and executor shall invest his personal property in real estate, bonds and mortgages, or other good securities, according to their own best judgment. Now, if the children named are to take a fee defeasible, then the money must be kept together until the last child is dead; no, not until the last child is dead; the issue or deceased children take their shares as their parents die, and take it in fee.

There is no provision in the will for partial settlements, as each child dies, and the unknown issue comes into his own and the whole will shows that no such thing is contemplated. The property is put in charge of the executrix and executor, not in the hands of trustees.

The appointment of a trustee might have indicated that Mr. Bischoff contemplated an indefinite period of holding, but when he conferred the duty upon his executrix and executor, he showed, and the will showed, that Mr. Bischoff apprehended that the time between his death and that of his wife would not be long, and therefore the time of distribution and the time of vesting of the estate will be short and appointed those to manage his estate who, in contemplation of law, should hold for but a short time.

Even if item 3 must be construed to cut down a fee simple to a fee defeasible, items four and six, subsequent items, which show that an early division is contemplated, ought to control the disastrous consequences of section three.

It seems to me that upon reading the will as a whole, it is very manifest that Mr. Bischoff intended that his wife should have the use of all of his property during her life, and that the mother love would prompt her to do just what he said could be done—use the property that had been his for the education and support of his wife and children, and then at her death, those children named, and such others as might be entitled, should take the estate and should take it so that it might be of some use to them, and treat his sons and daughters like men and women, and not keep them

as perpetual wards of chancery and require them at all times during their lives to apply to the Courts for permission to sell and reinvest every cent of their property.

For these reasons I dissent.

8623

TAYLOR v. STRAUSS.

TAXES—LIFE TENANT—REMAINDERMEN—TAX DEEDS.—The amount due for taxes is a debt due by the person listing the property for which he may be sued. A life tenant is required to assess the land in his possession as such and upon his default in paying taxes only his interest in the land can be sold under execution against him.

Before SPAIN, J., Sumter, November, 1912. Reversed.

Action by Maud O. Taylor *et al.* against Isaac Strauss and Taylor Goodman. Plaintiffs appeal on the following exceptions:

First. "Because his Honor erred in holding that section of the Revised Statutes of 1893 passed in A. D. 18 , was of such effect as that a sale of the land in this State for taxes and a deed to the purchaser made under such sale carried with it not only all right, title and interest of a life tenant but also all the right, title and interest of any remaindermen having a right to the title and possession of the property in question upon the termination of the life estate, the property in this case having been sold for taxes assessed against, and in the name of the life tenant.

Second. "Because his Honor erred in holding a ruling that the statute laws of this State were so altered and amended and subsequent to the decision of the Supreme Court on the point involved as announced in the case of Shell against Duncan, reported in volume 31, page of the South Carolina Reports that under the sale of the land

for taxes in this case assessed against the life tenant in 1895 that such tax sale carried with it to the purchaser not only all right, title and interest in the property of the life tenant, but also the rights of the remaindermen in the land in question, some of whom were not born and could not be expected to pay taxes at that time.

Third. "Because his Honor erred in that he should have held that a common source of title having been shown in this case in that both that claimed by the plaintiffs and that claimed by the defendants were derived from William Keels who devised the tract of land in question to his son, J. L. Keels, for life and after the death of J. L. Keels to the children of J. L. Keels, the fact being disclosed that the defendant's title came through a tax sale of said land assessed against the defaulting taxpayer, J. L. Keels, who owned only a life interest in said land and having died since said sale the remaindermen under said will having now the better title to the land according to the proof and that the issue should have been submitted to the jury to determine who has the better title from such common source.

Fourth. "Because his Honor should have held that section 360 of the Revised Statutes of 1893 limiting the right to recover against a tax title must necessarily be construed with the previous sections of said statute which require taxes to be assessed in the name of the true owner, and, therefore, persons referred to in section 360 could only be such persons against whom the taxes were assessed or those claiming by, through or under them.

Fifth. "Because his Honor erred in granting the motion for nonsuit in this case in that such application of the statutes referred to would open the door to fraud and permit any life tenant to defeat the title of remaindermen by failure on his part to do his duty in paying taxes on the land assessed against him and his estate, that such was not the intention of the legislature and such is not the meaning of the statute."

Mr. A. B. Stuckey, for appellant, cites: 31 S. C. 563; 70 S. C. 309.

Messrs. Lee & Moise, Harmon D. Moise and John H. Clifton, contra, cite: 50 S. C. 467; 29 S. C. 487.

July 25, 1913. The opinion of the Court was delivered by

MR. CHIEF JUSTICE GARY. This is an action to recover possession of the tract of land, described in the complaint, and the appeal is from an order of nonsuit.

The plaintiffs, some of whom are infants under the age of twenty-one years, claim title to the land in dispute, under and by virtue of the last will and testament of William Keels, deceased, who devised it to J. L. Keels, their father, for and during the term of his natural life, and after his death to be equally divided between his children.

The defendants denied the plaintiffs' title, and set up the following defenses: 1. That neither the plaintiffs, their ancestor, predecessor or grantor, were seized and possessed of the premises, within ten years next before the commencement of the action. 2. That the cause of action stated in the complaint accrued more than ten years next, before the commencement of the action, and is, therefore, barred by the statute of limitations. And, 3. That the cause of action accrued more than two years before the commencement of the action, and the plaintiffs are barred under and by virtue of the provisions of section 462, Code of Laws, 1912.

In 1895, the land was sold to pay the taxes, which had been assessed against J. L. Keels, and was purchased by the defendant, Isaac Strauss, to whom a deed of conveyance was made, under which he entered into possession, and which was duly recorded.

J. L. Keels died in 1905, and this action was commenced on the second day of March, 1911.

At the close of the plaintiffs' testimony, the defendants' attorneys made a motion for a nonsuit, on several grounds, but all were overruled except those based on section 115, Code of Laws, 1912, which is as follows:

"In all cases of sale, the sheriff's deed of conveyance, whether executed to a private person, a corporation, or to the commissioner of the sinking fund, shall be held and taken as *prima facie* evidence of good title in the holder, and that all proceedings have been regular and all requirements of the law have been complied with. No action for the recovery of land sold by the sheriff under the provisions of this act, or for the recovery of the possession thereof, shall be maintained unless brought within one year from the date of sale, and unless it be sustained by conclusive evidence from the tax duplicates, or from a tax receipt signed by county treasurer, or by a certificate signed by the secretary of State, or by his agent, showing that all of the taxes and levies for which the land was sold, with the costs that may have accrued thereon, were paid prior to the sale at the proper time, and to the properly authorized officials."

Plaintiffs appealed upon exceptions, which will be reported.

The main question presented by the exceptions is, whether section 115, Code of Laws, 1912, is applicable to this case.

Section 288, Code of Laws, 1912, provides, that "every person shall be liable to pay taxes and assessments, on the real estate of which he or she may stand seized in fee, or for life, by courtesy, in dower, as husband in right of his wife, or may have the care as guardian, executor, trustee or committee."

Section 290, Code of Laws, 1912, is as follows: "All taxes, assessments and penalties legally assessed shall be considered and held as a debt payable to the State by a party against whom the same shall be charged; and such taxes, assessments and penalties shall be a first lien in all cases whatsoever upon the property taxed; and the county

treasurer may enforce the said lien by execution against the said property; or, if it can not be levied on, he may proceed by action at law against the person holding said property."

Section 297, Code of Laws, 1912, contains the following provision: "All persons required by law to list property for others, shall list it separately from their own, and in the name of the owner thereof; but shall be personally responsible for the taxes thereon, for the year in which they list it, and may retain so much thereof, or the proceeds of the sale thereof, in their own hands, as will be sufficient to pay such taxes: *Provided*, That all lands shall be listed and assessed as the property of the person or persons having the legal title to, and the right of possession of, the land at the time of listing and assessment, and in case of persons having possession of lands for life, in the name of the life tenant."

Section 393, Code of Laws, 1912, is as follows: "The auditor shall make out in a book to be prepared for that purpose, in such manner as the comptroller general shall prescribe, a complete list or schedule of all taxable property in his county, and the value thereof as equalized, so arranged, as that each separate parcel of real property in each district, shall be contained in a line or lines opposite the names of the owners, arranged in numerical or alphabetical order. And the value of all personal property shall be set down opposite the names of the owners thereof, respectively; and if listed by any other person for and in the name of the owner, the name of such person, and the character in which he acted, shall also be stated in such list."

The deed of the sheriff to Isaac Strauss contains the following recitals:

"Whereas, It is provided that immediately upon the expiration of the time allowed by law, for the payment of taxes in any year, the county treasurer of each county shall issue in the name of the State, a warrant or execution against each defaulting taxpayer in his county, directed to the sheriff or his lawful deputy, requiring and command-

ing him to levy the same by distress and sale of so much of the taxpayer's estate, real or personal, or both, as may be sufficient to satisfy the taxes, State, school, county and special, of such *defaulters*; and further, that under and by virtue of such warrant or execution the sheriff shall take exclusive possession of so much of the *defaulting* taxpayer's estate, real and personal, or both, as may be necessary to raise a sum of money named therein; and,

"Whereas, There appears on the tax duplicate of Sumter county for the fiscal year commencing November 1st, 1892, to '93 and 1893 to '94, certain real estate, consisting of one hundred and nine acres of land (under two executions), assessed in the name of *J. L. Keel*, and valued at three hundred and fifty dollars; the taxes, penalties and assessments thereon amounting under both executions to twenty-seven 81-100 dollars; and,

"Whereas, The above named *J. L. Keels*, having neglected to pay to the county treasurer of Sumter county the above taxes, assessments and penalties as prescribed by law, an execution was issued therefor as directed by said act, on the 20th day of April, 1894, and 16th day of March, 1895, and lodged with the sheriff of Sumter county; and,

"Whereas, At a sale made as directed by said act, by the said sheriff, after levy under said execution and due notice, Isaac Strauss became purchaser, and having paid to the sheriff the said amount," etc. (*Italics added.*)

The statutes provide, that property in the possession of a life tenant, shall be listed for taxation against him, but they do not contemplate that the taxes should be assessed against the property of the remaindermen. It was, no doubt, supposed that the value of the life estate would be sufficient to satisfy the taxes; and the intention of the legislature was to prevent just such a case as the one now under consideration, where the rights of the remaindermen would otherwise be sacrificed, when there is no necessity to resort to their property.

Another reason why there was error in granting the nonsuit was, because the property of those alone, whose names are on the tax list, is subject to sale for nonpayment of taxes. In the case of *Smith v. Cox*, 83 S. C. 1, 65 S. E. 222, one of the reasons why the purchaser at the tax sale therein mentioned, was not allowed to hold possession of the property against the owner, was because a sale of land under a tax execution, issued on an assessment against one not the owner, is void. A further reason why there was error in granting the nonsuit was, because the case comes within the following principles, announced in *Black. Tax Titles*, page (4th ed.) 578, quoted with approval by Mr. Justice McGowan in *Shell v. Duncan*, 31 S. C. 547, 10 S. E. 330: "In those States where tax is a charge upon the land alone, where no resort in any event is contemplated against the owner or his personal estate, and where the proceeding is strictly *in rem*, the tax deed will undoubtedly have the effect to destroy all prior interests in the estate, whether vested or contingent, etc. In such case the tax law is notice to the whole world of the liability of the land for all public assessments, etc. If one neglect his duty in this respect, his title becomes extinct, and a new and independent title becomes vested in the purchaser, freed from all prior encumbrances, and, indeed, of every interest carved out of the old fee. On the other hand, where the law requires the land to be listed in the name of the owner, provides for a personal demand of the tax, and in case of default, authorizes the seizure of the body or goods of the delinquent, in satisfaction of the tax, and in terms, or upon a fair construction of the law, permits a sale of the land only, when all other remedies have been exhausted; then the sale and conveyance of the officer passes only the interest of him, in whose name it was listed, upon whom the demand was made, who had notice of the proceedings, and who alone can be regarded as legally delinquent. In such case the title is a derivative one, and the

tax purchaser can recover only such interest, as he may prove to have been vested in the defaulter at the time of the assessment, etc."

Under the statutes of this State, as we have shown, the amount due for taxes is a debt against the person listing the property, for which he may be sued. Furthermore the real estate can not be sold until the personal property has been exhausted. *Ebaugh v. Mullinax*, 34 S. C. 364, 13 S. E. 613.

It is the judgment of this Court that the judgment of the Circuit Court be reversed, and that the case be remanded to that Court for a new trial.

8624

TUCKER v. CLINTON COTTON MILLS.

1. ATTRACTIVE NUISANCE—NONSUIT—VERDICT.—Where the testimony tends to prove all the material allegations of the complaint as to the maintenance of an unprotected pond in which a child of tender years was drowned, motions for nonsuit and direction of verdict on ground that there was failure to establish these allegations were properly refused.
2. CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISKS—ISSUES.—Where the evidence as to contributory negligence and assumption of risks is susceptible of more than one inference, those issues should be sent to the jury.
3. CHARGE—REQUESTS.—Where the Judge embodies in his general charge the substance of requests there is no error.

Before F. B. GARY, J., Laurens, July term, 1912. Affirmed.

Action by Nannie Tucker, administratrix of Roy Tucker, against Clinton Cotton Mills. Defendant appeals.

Messrs. T. P. McGowan, Richey & Richey, for appellant, cite: *There was a variance between the allegations of manner*

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of death and proof: 47 S. C. 30; 45 S. C. 278. *Law of master and servant applies:* 81 S. C. 16; 83 S. C. 19; 26 Cyc. 1080, 1202, 1088, 1244; 63 S. C. 170; 4 Ency. 46; 72 S. C. 242, 348; 80 S. C. 232; 58 S. C. 413; 29 Cyc. 542, 555. *Contributory negligence:* 4 Ency. 47; 14 Ency. 861; 100 Ind. 293; 28 Ind. 28; 58 S. C. 413; 76 S. C. 539. *The law of emergency:* 29 Cyc. 524, 446-7; 4 Ency. 38; 17 S. E. 38.

Messrs. Cannon & Blackwell, contra, cite: Point not called to attention of trial Judge will not be considered: 63 S. C. 559; 61 S. C. 404; 69 S. C. 555; 64 S. C. 229; 75 S. C. 25; 80 S. C. 460. *Issue of negligence was for jury:* 65 S. C. 332; 61 S. C. 345. *As to relation of master and servant:* 64 S. C. 212; 74 S. C. 16; 83 S. C. 342; 78 S. C. 10. *As to assumption of risk:* 80 S. C. 539; 75 S. C. 390; 61 S. C. 468. *As to contributory negligence:* 58 Am. R. 463; 96 Am. St. R. 459; 101 Id. 283; 33 Id. 690. *Covering requests in general charge is sufficient:* 72 S. C. 74; 65 S. C. 161.

July 25, 1913. The opinion of the Court was delivered by

MR. CHIEF JUSTICE GARY. This is an action for damages, alleged to have been sustained by the plaintiff, on account of the wrongful acts of the defendant, in causing the death of her intestate son.

The allegations of the complaint material to the questions presented by the exceptions, are as follows:

(1) "That on the 23d day of June, 1911, and prior thereto, the defendant, Clinton Cotton Mills, owned, maintained and used in connection with its cotton mill at Clinton, South Carolina, a large and deep dam or reservoir, which it kept filled with water, to be used in connection with its said cotton mill, the said dam or reservoir being located near the Clinton Cotton Mills, public streets and many of the resi-

dences of the town of Clinton, where children of tender years were accustomed to resort for play, the said dam or reservoir not being protected by a fence, guard or otherwise, but was exposed and easily accessible to children, who, not knowing of the danger, made use of it as a place of amusement.

(2) "That it was the duty of the defendant, Clinton Cotton Mills, to have securely protected the said dam or reservoir, so that children resorting to it as a place of amusement, would not be injured, but the said defendant, not regarding its duty in that behalf, carelessly, negligently, wilfully, and wantonly permitted the said dam or reservoir, to be and remain uninclosed or unprotected in any way.

(3) "That the defendant, Clinton Cotton Mills, knew of the unprotected condition of said dam or reservoir, and that children resorted there as a place of amusement, which facts this plaintiff is informed and believes, and so alleges had been more than once called to the attention of the defendant, with the request that the said dam or reservoir be properly protected.

(4) "That the plaintiff's intestate, Roy Tucker, a small boy of tender years, being about fourteen years of age, while playing around said dam or reservoir on the 23d day of June, 1911, fell into the said dam or reservoir, which was filled with water, and was drowned; that the plaintiff is the mother of the said Roy Tucker, deceased, for whose benefit this action is brought and maintained.

(5) "That the dam or reservoir mentioned aforesaid was so constructed and used by the defendant, Clinton Cotton Mills, that the hot water from its boilers and other portions of said mills was run back into said dam or reservoir, and that at the time said Roy Tucker fell into said dam or reservoir and drowned, the water was almost scalding hot.

(6) "That Roy Tucker was an employee of the said defendant, Clinton Cotton Mills, at the time of his death, and was at work for the defendant on said date, and that the

plaintiff, the mother of the said Roy Tucker, had previously requested the said defendant not to allow her son to leave the said cotton mill, until its regular stopping hour for dinner or otherwise, which the defendant negligently, carelessly, wilfully and wantonly disregarded on the day that her son was drowned."

The defendant denied the alleged wrongful acts, and by way of defense alleged: "That the said Roy Tucker was well acquainted with the character, conditions and surroundings of the said mill pond and was of a sufficient intelligence and capacity to comprehend and understand its dangers, and so carelessly, recklessly and negligently jumped across a gap in the dam in said pond, and thereby induced his younger brother to attempt to leap across the said gap in said pond, and caused his younger brother to fall therein, and so carelessly and negligently attempted to rescue his younger brother from drowning in said pond, that he thereby contributed to his death as a proximate cause thereof, without which his death would not have occurred."

The defendant also set up the defense of assumption of risk, both as to Roy Tucker and the plaintiff.

At the close of the plaintiff's testimony the defendant made a motion for a nonsuit, which was refused; and, at the conclusion of all the testimony, it made a motion for the direction of a verdict on the same grounds as the motion for nonsuit, which was also refused.

The jury rendered a verdict in favor of the plaintiff for one thousand dollars. The defendant made a motion for a new trial, which was overruled. The defendant then appealed upon numerous exceptions.

There was testimony tending to prove all the allegations of the complaint hereinbefore mentioned. Therefore, the exceptions assigning error, in the refusal to grant the

1 motion for nonsuit, on the ground that there was a failure of testimony to establish the material allegations of the complaint, must be overruled.

Conceding that there was testimony to the effect that Roy Tucker was guilty of contributory negligence, and that Roy Tucker and the plaintiff assumed the risks incident
 2 to his employment. Nevertheless, the testimony is susceptible of more than one inference, and those issues were properly submitted to the jury.

The defendant presented certain requests to charge, which his Honor, the presiding Judge, did not charge in the
 3 form in which they were presented, but stated that he would endeavor to embrace them in his general charge, which he did.

The exceptions assigning error in this respect, are, therefore, without merit.

There are exceptions assigning error in certain portions of his Honor's charge, but when the charge is considered in its entirety, it will be seen that there was no prejudicial error. The charge was full, clear, and able, and fairly presented to the jury, the law applicable to the case.

The exceptions assigning error on the part of the presiding Judge, in stating the issues raised by the pleadings cannot be sustained, as it does not appear that he was requested to make the necessary correction.

None of the other exceptions can be sustained, for, even conceding there was error in the particulars therein specified, it has not been made to appear, that it was prejudicial. Judgment affirmed.

8625

MAGILL v. SOUTHERN RAILWAY.

1. EVIDENCE—DECLARATIONS—*RES GESTAE*.—Statements made by one injured by a train of freight cars as soon after the injury as those near could get to him as to how he was injured are admissible as part of the *res gestae*. That declarant was dazed or shocked does not render the declarations incompetent, but only affect their weight.

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2. **IBID.—RULE.**—Error in admitting parol evidence as to the contents of a printed rule is cured by introduction of the rule.
3. **IBID.—EXPERT EVIDENCE.**—One conversant with the length of freight cars may testify as to their length and the distance they extend over the ends of the crossties, and such evidence is competent on the issue of injury caused by a freight car extending over the crossties.
4. **RAILROADS—INDUSTRIAL SIDETRACKS—CHILDREN—ISSUES.**—Whether a railroad company was negligent in running a train of freight cars over an industrial sidetrack rapidly, where children were accustomed to be and where the company had left a pile of crossties piled near the track irregularly in violation of its rules on or near which a child was struck and injured, and whether the train came in without proper lookout, were issues under the evidence here for the jury.
5. **IBID.—NUISANCE—CHILDREN.**—While this Court is not prepared to hold that a pile of crossties is *per se* an attractive nuisance for children, yet the evidence as to the place in question and of the use made of it by children, warranted submitting this issue to the jury.
6. **CHARGE.**—In giving a request it is the duty of the Judge to make clear in his own language or that of this Court in former decisions, what the principle of law embodied in the request is.

Before SEASE, J., York, November term, 1912. Affirmed.

Action by Samuel T. Magill, by guardian, against Southern Railway and W. W. Ferris. Defendants appeal.

Messrs. B. L. Abney and McDonald & McDonald, for appellants.

Mr. Thos. F. McDow, contra, cites: Duty to warn: 93 S. C. 17. Declarations as part of res gestae: 68 S. C. 310; 47 S. C. 9; 68 S. C. 313; 86 S. C. 102. Contents of collateral writing may be given: 89 S. C. 417; 59 S. C. 467; 82 S. C. 427. Evidence on same point cures error: 78 S. C. 143; 70 S. C. 315; 41 S. C. 415; 36 S. C. 374.

July 25, 1913. The opinion of the Court was delivered by

MR. JUSTICE WATTS. This was an action in the Court of Common Pleas for York county for \$20,000 damages for alleged personal injuries to the plaintiff, received while on or near the track of the defendant, Southern Railway Company. The case was heard by Judge Sease, and a jury, at the November term of the Court, for said county, in 1912, and resulted in favor of the plaintiff for \$8,000. At the close of plaintiff's testimony a motion was made and granted by the Court to direct a verdict for the defendant as to the cause of action for punitive damages set out in the complaint. At the close of all testimony, the defendants asked the Court to direct a verdict in their favor on two grounds: (1) That there was no evidence tending to show a breach of any duty that the defendants owed to the plaintiff, and that there was, therefore, no evidence of negligence on their part which was the proximate cause of his injuries. (2) Upon the ground that the plaintiff was a trespasser upon one of the cars of the defendant, and that there was no evidence of a breach of any duty on the part of the defendants owed to the plaintiff. This motion was refused. After verdict was rendered a motion for a new trial was made and refused. Defendants, after entry of judgment, appeal and allege error by twelve exceptions. At the hearing in this Court appellants' counsel announced that they abandoned exceptions two and three.

Exceptions one, four, and five, allege that his Honor was in error in permitting over defendants' objection plaintiff's witnesses to testify as to certain matters.

Exception one, in permitting witness, McNinch, to testify as to statements made by plaintiff as to how he received the injuries, as such statements were not part of the *res gestae*, and the plaintiff was not at that time in a condition to

- 1 make an intelligent statement, being dazed and shocked. As to exception one in allowing McNinch,

the uncle of the plaintiff, to detail the statement, made by the plaintiff, immediately after he received the injury. We see no error in this, as we think it was admissible as part of the *res gestae*. As was said in the case, *State v. Arnold*, 47 S. C. 9, 24 S. E. 926, the Court held admissible as *res gestae* the statement, "Charlie shot me to death," made by a man in a doorway of a house from which he staggered some thirty yards and fell, the utterances being made a few minutes after the shooting to the first person who reached him in response to his cries for help. The declarations here in question were probably made within two or three hundred feet of the place of the shooting. These circumstances of time and place do not alone necessarily prevent a declaration from being part of the *res gestae*, but, they are factors, with other circumstances, in determining whether the declarations were the spontaneous utterances of the mind under the immediate influences of the transaction." The Court in the same case further says: "Questions of this kind must be very largely left to the sound judicial discretion of the trial Judge, who is compelled to view all of the circumstances in reaching his conclusion, and this Court will not reverse his ruling, unless it clearly appears from undisputed circumstances in evidence that the testimony ought to be admitted or rejected, as the case may be." "In the nature of the case there can be no hard and fast rule as to the precise time near an occurrence within which declarations explanatory thereof must be made in order to be admissible. The general rule is that the declarations must be substantially contemporaneous with the litigated transaction and be the instinctive, spontaneous utterances of the mind while under the active influences of the transaction, the circumstances precluding the idea that the utterances are the result of reflection or designed to make false or self-serving declarations." *State v. McDaniel*, 68 S. C. 310-311, 47 S. E. 384.

"This Court has several times held that the declaration need not be made coincident with the injury, but near about

it, so nearly that it is not likely that the declaration could be manufactured." *Williams v. Southern Railway Co.*, 68 S. C. 313-314, 47 S. E. 706. See, also, *Shelton v. Southern Railway Co.*, 86 S. C. 102-103, 67 S. E. 899, wherein the Court says: "The testimony on the part of the plaintiff was that the second car from the engine was the first to jump the track and that the engine ran on about three-quarters of a mile before it stopped; the engineer said he stopped within one hundred and fifty or two hundred yards; and when the engineer ran his engine back to the wreck he said to the conductor: 'Cap, we have played hell.' Error was imputed to the Judge in admitting the declaration of the engineer on the ground that it was too long after the accident to be admitted as part of the *res gestae*." The Court quotes from the case of *State v. McDaniel*, and says: "While the length of time between the wreck and the making of the declaration in this case was such as to raise some doubt as to its admissibility, it was not such a clear case as would warrant the holding that the testimony was not within the rule." When this evidence was admitted McNinch, the witness, testified that he had been in his office looking after some business, had changed his clothes, put on overalls and was standing in the porch of the store and was hailed, turned and saw a brakeman, of the railroad of this train, running, and the brakeman hollered: "Captain, for God's sake get a doctor here quick. We have killed a man, or cut a man's leg off." I followed in a moment after sending to Fort Mill for a doctor. In answer to the question, "You got up there as quickly as you could?" He said, "Yes, sir. I was there inside of half a minute. I couldn't have been longer, as soon as I could run there as hard as I could go." "Did he make a statement as soon as you got there?" "Yes, sir; just as soon as I got down on my knees by him. Oh, I guess it was a few seconds."

As to that part, which complains that when statement was made by plaintiff he was dazed and shocked, the evidence

was admissible, and what force, and effect, and credence the jury gave to it, was for the jury alone, but in answer to a question by his Honor, as to whether the statement made by plaintiff was sensible and coherent, or rambling, the witness' answer was: "It was as intelligent as could be. There is no question about it." This exception is overruled.

Exceptions two and three were abandoned at the hearing of the case.

Exception four alleges error in allowing plaintiff's witness, Berry Hill, to testify as to the existence of a rule of the company, forbidding employees to place obstructions near the track. This exception is overruled for the

2 reason that later in the trial the rule was brought out in examination of one of the defendant's witnesses, E. L. Hughes, and for this reason the exception cannot be sustained. *Hyland v. Telephone Co.*, 70 S. C. 315, 49 S. E. 879; *Young v. McNeil*, 78 S. C. 143, 59 S. E. 986.

Exception five is as follows: "Because his Honor erred in permitting the plaintiff, over the objection of defendants, to prove by their witness, W. H. Howard, that freight cars, other than those that are alleged to have injured the

3 plaintiff, projected out over the ends of the cross-ties; the error being that it was incompetent to prove that the size or length of other cars might have been, or how far their ends would project over the ends of crossties, as it was not shown that they were of the same width or size as the one that injured the plaintiff, as alleged in the complaint."

By reference to the testimony of Howard it will be seen that he had run as a train hand, and on switch engine, and witness had made experiments on the morning that the injuries occurred, that he was called as an expert witness, and testified sufficiently to show that he was an expert, and was entitled to give an opinion, and his testimony was not contradicted by any of the train crew, who were on the train

at the time of plaintiff's injury, and who were present at the trial of this case. This exception is overruled.

Exceptions six and seven allege error on the part of his Honor in not directing a verdict for the defendants on the grounds stated and depends entirely upon the question

whether or not there was any evidence tending to

- 4 show negligence on the part of the defendants, which was the proximate cause of the plaintiff's injury.

The specifications of negligence are that the defendant railway company negligently, and in violation of its own rule, placed in the pathway, commonly used by the residents of the village in going to and from the village, including making trips to the defendant's passenger station and that the defendant knew, or should have known, that this pathway was in constant use, placed in the pathway, and in close proximity to the end of the crossties, of said track, a large number of crossties, piled up irregularly, and negligently failed to require them to be removed. That notwithstanding defendants' knowledge that children of very tender years were frequently upon said pile of crossties, and notwithstanding defendants knew of the perilous situation of the plaintiff, or by the exercise of due care could have known it, they failed to warn the plaintiff, and took no means of precaution to save said plaintiff from the injuries suffered by him. That defendants failed to keep watch and look out on front of moving train of cars so as to prevent injury to any person along the pathway; and particularly to prevent any injury to children of tender years, who, with knowledge and consent of defendants, were accustomed to travel along the pathway, and to be upon the crossties. That while the plaintiff, a child of tender years, was on the pile of crossties the defendants recklessly and negligently ran said cars on the sidetrack at an excessive and dangerous rate of speed.

We do not think his Honor was in error in submitting the case to the jury for their determination as more than one inference could be drawn from the evidence in the case.

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There was some evidence in the case that the pathway was commonly used, and that the crossties were put where they were in violation of the defendant company's rule, and that children were accustomed to play there, and that the employees of the company failed to keep a proper look out, and that the train came in at a high rate of speed, and that the shifting was done in too short a time, as they were in a hurry to go two miles to get on a sidetrack, and make way for the passenger train. There was some evidence of a loose door, in one of the cars, swinging. There was some evidence that the plaintiff might have been injured by the loose swinging door projecting out, as cars came around the curve at the rate of speed testified to, or by a rod projecting under the car, the car step on the end of the car, which projected out, or the car itself projecting over. It was for the jury to determine under all of the facts and circumstances of this case, as testified to, whether the defendant owed the plaintiff, any duty, or whether they were guilty of any actionable negligence. "The owner of the land over which the railroad runs has the right to use it in any way, not inconsistent with the rights of the railroad company." *Harman v. Railroad Co.*, 72 S. C. 228, 51 S. E. 689.

The evidence in this case shows that the railroad was a sidetrack going to an industrial plant and that the path was constantly used by the residents of the vicinity. The evidence further shows that McNinch, the uncle of the plaintiff, owned the industrial plant in question, and that Charles Magill, the father of the plaintiff, has charge of the brick mill there. That plaintiff lived with his father and he and other children, as well as the employees of the industrial plant, used the pathway in question in going to school, to the station, and village, and the path had been so used since the erection of brick mill over ten years. It was held in *Goodwin v. Railroad*, 82 S. C., that the rights of the owner of an industrial plant and of its employees over the ground along which the industrial plant road ran were much greater than

over the right of way of a railroad company along the main line.

"Where the public has constantly used a pathway along a railroad track, the railroad company owes the duty to be on the lookout for them and not injure them. If such persons are not trespassers but licensees in such cases it is the duty of the railroad company to expect persons near the track and keep a lookout for them." *Jones v. Railway*, 61 S. C. 556, 39 S. E. 758; *McKeown v. Railway*, 68 S. C. 483, 47 S. E. 713; *Matthew v. Railroad Co.*, 67 S. C. 510, 46 S. E. 336; *Sanders v. Railway Co.*, 93 S. C. 543, 73 S. E. 356.

"The duty of a locomotive engineer and fireman to keep a vigilant look out ahead, for the sake of passengers, as well as those who may be helpless upon the track, is urgent and the failure to keep such a lookout may be evidence of recklessness or wantonness." *Wilson v. Southern Ry.*, 93 S. C. 17. These exceptions are overruled.

The eighth, ninth, tenth, and eleventh exceptions impute error to the Circuit Judge in his charge to the jury. As to the eighth exception, an examination of the charge as a whole will show that his Honor did charge the
5 request, as asked for by appellant, but he read from the case of *Franks v. Southern Cotton Oil Co.*, 78 S. C. 15, 58 S. E. 960, the language quoted and approved by the Court in that case in connection with this request, and while we are not prepared to say that a pile of cross-ties are *per se* attractive to children as a place to play, the evidence as to this particular place, and how it was used by them, was competent to go to the jury, and his Honor committed no prejudicial error, in quoting from the *Franks* case, *supra*, in connection with appellant's request to charge and this exception is overruled.

Exceptions nine and ten complain of error in modifying defendant's third and fourth requests. What is said in overruling the eighth exception disposes of these exceptions also, and they are overruled.

The eleventh exception is overruled, as his Honor charged that law fully and correctly, not only as to what duty the defendant owed to a trespasser, but likewise charged what it owed as a duty to a licensee. He charged the

6 requests, and carefully explained what the law was in connection with the decisions of this Court. It is the duty of the Judge to give the law to the jury and in charging a sound proposition of law he has a right to explain fully, and make clear in his own language, or the decisions of the Court, what the law of the case really is, and what idea the request intends to convey of the law of the case.

The twelfth exception is overruled for the reasons set out in overruling exceptions six and seven, as this exception practically raises the same question as these exceptions.

Judgment affirmed.

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EX PARTE MASSEE.

1. THE REQUISITION papers in this case are held to comply with the requirements of the Federal statutes. The objection that the certificate of the clerk of the Tennessee Court is to the effect that there is no indictment except what appears in the Court minutes is untenable.
2. *IBID.*—*HABEAS CORPUS*—*BAIL*.—The duty of the Court under writs of *habeas corpus* in extradition cases is simply to inquire if the requisitions of the Federal statutes have been met and pending that investigation bail should not be granted unless some departure from the Federal law has been made to appear. In such investigation the Courts of the asylum State should not inquire into the motive of the prosecution in the demanding State.
3. *IBID.*—*IBID.*—*IBID.*—Where requisition papers are regular on their face every intendment should be indulged in favor of their validity, but where the prisoner has made the *prima facie* showing that they are not regular, he may be admitted to bail pending the final hearing.
4. *IBID.*—*BAIL*.—Should bail be given in extradition proceedings without notice to the State?

5. *IBID.*—EVIDENCE.—AFFIDAVITS of third persons that the governor of the demanding State had stated to affiants that he did not sign the requisition papers, should not be admitted to impeach the validity of the requisition.
6. *IBID.*—*IBID.*—A telegram from the demanding governor to the asylum governor and one from this governor to the Court should be considered only as an inducement to continue the investigation until the demanding governor could formally declare his position.
7. *IBID.*—The validity of extradition proceedings should not be adjudged without the presence of the body of the prisoner before the Court, whether he is on bail or not.

Before SEASE, J., Spartanburg. Reversed.

Application by W. J. Massee for discharge under writ of *habeas corpus* from arrest under requisition from the Governor of Tennessee. State appeals.

Messrs. Attorney General Frierson, of Tennessee, H. S. Stokes and Nichols & Nichols, for appellant.

Messrs. Jno. Gary Evans, C. C. Wyche and Sanders & DePass, contra.

July 26, 1913. The opinion of the Court was delivered by

MR. JUSTICE WOODS. The petitioner, W. J. Massee, was arrested by sheriff of Spartanburg county under the mandate of his Excellency, Cole L. Blease, Governor of South Carolina, issued on the 25th day of July, 1912, in accordance with a requisition from his Excellency, Ben W. Hooper, Governor of Tennessee. On the same day, upon the application of Massee, Hon. T. S. Sease, Circuit Judge, issued a writ of *habeas corpus* returnable in the afternoon of that day. The sheriff made return to the writ, "that W. J. Massee is held in my custody, under telegram from Governor Cole L. Blease and warrant issued by magistrate A.

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H. Kirby, charged with making threats and using duress to induce Robert Williams to dismiss an action in United States Court." The record contains this statement of the proceedings before Judge Sease: "Counsel for the petitioner then moved that the petitioner be admitted to bail pending the hearing of the foregoing writ. Counsel for the State objected on the ground that the statutory four days' notice had not been given. This objection was overruled, and his Honor passed the following order admitting Massee to bail, his Honor ruling and holding that appellant was entitled to four days' notice; but that he would admit the petitioner to bail in the meantime." Accordingly, an order was made that Massee be discharged from custody on giving bond in the sum of \$10,000, conditioned for his appearance before Judge Sease on the 27th day of July, 1912. The bond was made and Massee was discharged. In the meantime, on the 26th of July, Governor Blease, having received a telegram signed by Governor Hooper stating that the requisition had been signed by mistake and was revoked, requested Judge Sease to continue the hearing until Governor Hooper's telegram could be authenticated under the seal of the State of Tennessee. An order was accordingly made postponing the hearing until the 7th of August, and requiring Massee to appear in person before Judge Sease on the 7th of August at 10:30 in the forenoon, and continuing the bond in force until that time. In passing this order, Judge Sease considered, without objection of counsel, the telegram of Governor Blease to him, the telegram of Governor Hooper to Governor Blease, and a telegram from James B. Cox, Esq., of Knoxville, to Massee stating that Governor Hooper had promised to revoke the requisition.

Massee did not appear on the 7th of August, pleading illness as an excuse, and his counsel presented a paper, purporting to be signed by Massee, waiving his right to be present at the *habeas corpus* proceedings. Counsel for the State of Tennessee objected to the hearing in the absence of the

petitioner on the grounds: "(a) That the bond was conditioned upon the personal appearance of the petitioner, W. J. Massee, before his Honor, and upon the failure of the petitioner, to enter his appearance in person, the condition of the bond was broken; (b) that in a *habeas corpus* proceeding in which the *ex vi termini* and as the law directs the body of the petitioner must be brought into Court, the personal appearance of the petitioner was a duty and not a personal right which could be waived." Overruling these objections, Judge Sease proceeded with the hearing, and admitted for his consideration in the matter the telegram from Governor Hooper to Governor Blease purporting to revoke the requisition, the telegram from James B. Cox, Esq., to Massee stating that Governor Hooper had promised to revoke the requisition, and an affidavit of W. D. McNeil to the effect that, in a conversation with him, Governor Hooper gave his reasons for reinstating the requisition and stated that he did not previously sign the requisition.

In overruling the objection to all these documents made on the ground that they were mere hearsay, and that the formal requisition of the governor of a State was not subject to collateral attack in this manner, and that counsel were taken by surprise and had no opportunity to meet the statements of the affidavits of McNeil, Judge Sease held "that as such had been introduced before him and considered by him when he passed the order extending the time for the hearing, they were already in, and would be considered by him, as they were referred to in an order previously passed by him in this matter." Counsel for the prosecution then produced a telegram from Governor Hooper to Governor Blease, dated July 26, 1912, withdrawing the message of the day before purporting to revoke the requisition.

Upon this showing, after argument, Judge Sease made the following findings and judgment: "1. That the requisition is irregular on its face and not in conformity with the act of Congress relating thereto, in that no copy of the indictment

found by the Courts of Tennessee as required by law was produced. 2. I find as a matter of fact, that the requisition was not authorized by the Governor of Tennessee, but the same was issued without authority, and is, therefore, null and void. It is, therefore, ordered and adjudged that the prisoner, W. J. Massee, be discharged from the custody of the sheriff and his recognizance cancelled of record and that he be allowed to go hence without delay."

The validity of the requisition from the Governor of Tennessee depends on whether the papers transmitted by him to Governor Blease were made out as required by the Federal statute; and we think that Judge Sease was clearly in error in holding that they were on their face irregular and defective.

The statute provides: "Whenever the executive

1 authority of any State or Territory demands any person as a fugitive from justice of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or affidavit made before a magistrate of any State or Territory charging the person demanded of having committed treason, felony or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secure him, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear." Revised Statutes of United States, sec. 5278. The objection sustained was that no copy of the indictment found by the Courts of Tennessee was produced. The record before us shows that the copy of an indictment charging a crime under the laws of the State of Tennessee was attached to the requisition, and certified therein by Governor Hooper to be authentic. The objection that the certificate of the clerk of

the Circuit Court stated that the paper purporting to be an indictment was a copy of the minutes of the Court, and not of the indictment, has no foundation. Even under the strictest verbal test, the certificate can bear no other construction than that the indictment appears in the minute book, and that the indictment itself, not the minute book, was on file in the clerk's office. There can be no doubt that the requisition papers were, on their face, regular in every respect.

The assigned error next in sequence is the admission of the petitioner to bail pending the hearing, without notice to the attorneys representing the prosecution. The question made is not now a practical one, for the bail bond was
2 taken and the petitioner released, and it would be impossible for this Court to restore the status existing before the bond was taken. But since the point is important, we may state our views of it. Legislation in respect to extradition of fugitives from one State to another being within the power of Congress, the regulations fixed by Federal statutes are paramount to State Constitutions and statutes, and all that a State Court can do under *habeas corpus* proceedings is to determine whether the conditions prescribed by the Federal Constitution and statutes have been complied with. If they have not, the Court may release absolutely or on bail, according to its discretion.

The general rule in *habeas corpus* proceedings is well established that pending a final hearing the Judge or Court may admit to bail. *Barth v. Clive*, 79 U. S. 400, 20 L. Ed. 393; *In re Kaine*, 14 Howard 134. But extradition laws are enacted on the presumption that the State making the demand will accord to the fugitive his right to bail and all other legal rights; and when it is remembered that the power of the Court or Judge under *habeas corpus* is necessarily limited to the inquiry, whether the conditions of the Federal laws have been met, it seems obvious that bail should not be allowed pending the hearing, unless some departure from the Federal law has been made to appear. On this point, the

reasoning of the Supreme Court of the United States on the subject of international extradition, applies with equal force to State extradition. In *Wright v. Henkel*, 190 U. S. 40, 47 L. Ed. 948, Chief Justice Fuller said: "The demanding government, when it has done all that the treaty and the law requires it to do, is entitled to the delivery of the accused on the issue of the proper warrant, and the other government is under obligation to make the surrender; an obligation which it might be impossible to fulfil if release on bail were permitted. The enforcement of the bond, if forfeited, would hardly meet the international demand; and the regaining of the custody of the accused obviously would be surrounded with serious embarrassment. And the same reasons which induced the language used in the statute would seem generally applicable to release pending examination." *Ex parte Wall*, 84 Miss. 783, 38 So. 628; *Ex parte Hobbs*, 32 Tex. Cr. Rep. 312, 40 Am. St. Rep. 782; *In re Foye*, 21 Wash. 250, 57 Pac. 825, 19 Cyc. 96.

But under *habeas corpus* proceedings the Courts may inquire whether the prisoner really falls under the conditions of the Federal statute; that is, whether he is subject to extradition. For example, they may ascertain whether the prisoner is the person charged, whether he is a fugitive from justice, whether the papers show that he was in the demanding State at the time the offense was committed, and whether the act charged was a crime against the laws of the demanding State; but judicial inquiry cannot extend to the motive of the proceedings. The Supreme Court of the United States in *Robb v. Connelly*, 111 U. S. 624, 28 L. Ed. 542, declared the power of the State Courts to inquire under the writ of *habeas corpus* whether the statutes of the United States have been complied with, using this language: "What we decide—and the present case requires nothing more—is, that, so far as the Constitution and laws of the United States are concerned, it is competent for the Courts of the State of California, or for any of her Judges—having power,

under her laws, to issue writs of *habeas corpus*, to determine, upon writ of *habeas corpus*, whether the warrant of arrest and the delivery of the fugitive to the agent of the State of Oregon, were in conformity with the statutes of the United States; if so, to remand him to the custody of the agent of the State of Oregon."

In *Pearce v. Texas*, 155 U. S. 311, 39 L. Ed. 164, the Court approved of the action of the Courts of the asylum State in leaving to the Courts of the demanding State the protection of the prisoner in his constitutional rights.

In *Hyatt v. New York*, 188 U. S. 691, 47 L. Ed. 657, it was held that the Court might discharge the prisoner when it appeared on the face of the extradition papers that he was not in the demanding State at the time the crime was committed; but in *Munsey v. Clough*, 196 U. S. 364, 49 L. Ed. 515, the Court said: "But the Court will not discharge a defendant arrested under the Governor's warrant where there is merely contradictory evidence on the subject of presence in or absence from the State, as *habeas corpus* is not the proper proceeding to try the question of *alibi*, or any question as to the guilt or innocence of the accused."

The Court held in *Pettibond v. Nichols*, 203 U. S. 192, 51 L. Ed. 148, that the inquiry in *habeas corpus* whether the prisoner was a fugitive from justice could not extend to an inquiry into his guilt or innocence, saying that, "the constitutional and statutory provisions referred to were based upon the theory that, as between the States, the proper place for the inquiry into the question of the guilt or innocence of an alleged fugitive from justice is in the Courts of the State where the offense is charged to have been committed."

In *Pierce v. Creecy*, 210 U. S. 387, 52 L. Ed. 1113, Mr. Justice Moody lays down the limitation of the judicial power of inquiry in *habeas corpus* in this language: "This Court in the cases already cited, has said, somewhat vaguely but with as much precision as the subject admits, that the indictment, in order to constitute a sufficient charge of crime to warrant

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interstate extradition, need show no more than that the accused was substantially charged with crime. This indictment meets and surpasses that standard, and is enough. If more were required it would impose upon Courts, in the trial of writs of *habeas corpus*, the duty of a critical examination of the laws of a State with whose jurisprudence and criminal procedure they can have only a general acquaintance. Such a duty would be an intolerable burden, certain to lead to errors in decision irritable to the just pride of the States and fruitful of miscarriage of justice. The duty ought not to be assumed unless it is plainly required by the Constitution, and, in our opinion, there is nothing in the letter or the spirit of that instrument which requires or permits its performance."

These statements of the principle involved, by the tribunal to whose authority, in questions of this kind, all other Courts must yield, have made clear the principle that the authority of the Courts, in extradition proceedings, does not extend to inquiry into the motive, or into the merits of the case in any respect. The Supreme Court of this State and other State Courts of high authority have explicitly laid down the same limitation.

In *Ex parte Swearingen*, 13 S. C. 74, Mr. Justice McIver, with his usual force and clearness, thus states the rule: "It seems to us that the true rule is that when a requisition comes to the Governor of this State for any person found in this State, which shows upon its face that all the requirements of the act of Congress have been complied with, it is the duty of the proper authorities of this State to recognize the statements of fact made therein as true, and to surrender to the agent of the State making the demand the person demanded, in the fullest confidence that he will receive ample justice at the hands of the authorities of such State. The very fact that there is no mode of enforcing the performance of the duty imposed upon the Governor of the State upon which the demand is made, by *mandamus* or otherwise

(*Kentucky v. Dannison, supra*), makes it all the more obligatory that he should be scrupulous and exact in the performance of such duty, and that the Courts should not lend their aid to defeat the provisions of the Constitution so essential to the preservation of that good will which ought always to exist between sister States, by demanding more than is required by the act of Congress." *In re Sulton*, 115 N. C. 57, 44 Am. St. Rep. 433; *Barrenger v. Baum*, 103 Ga. 465, 68 Am. St. Rep. 113; *Singleton v. State* (Ala.), 42 So. 23; *Ex parte Edwards* (Miss.), 44 So. 827; *Ex parte Berry-nell* (Iowa), 133 N. W. 1057. See, also, extended note 57 Am. Dec. 395, 21 Cyc. 329.

Another established and obvious principle is that when the extradition papers are regular on their face every intendment is to be indulged in favor of their validity, and the bur-

den is on the prisoner to show that some one of the
3 conditions of extradition prescribed by the statutes, as above indicated, have not been met. *Marbles v. Creecy*, 215 U. S. 63, 54 L. Ed. 92. When the prisoner has made that *prima facie* showing, the Court or Judge issuing the writ may admit him to bail pending the final hearing on the writ.

Applying these settled rules, it is perfectly clear that the Circuit Judge erred in admitting the prisoner to bail pending the final hearing. When the application was made, the showing before the Judge consisted of the requisition papers of the Governor of Tennessee, and the mandate of the Governor of South Carolina, all made out in accordance with the statute, and the verified petition of the prisoner. This petition contained nothing but statements that he intended to show that, while the prisoner had violated the criminal laws of Tennessee, he was guilty of no moral wrong, that the prosecution was a hardship on him, that it was instituted to collect a debt, and that the Governor of Georgia had refused to issue a requisition. All this had no tendency to show that the extradition statute had not been complied with, and,

therefore, under the principles just stated and the authorities sustaining it, furnished no ground whatever for the discharge of the prisoner on bail. This being so, the law required that the petitioner should be remanded to the custody of the sheriff to be thereafter surrendered to the State of Tennessee, according to the mandate of the Governor of the State of South Carolina, unless at the future hearing, ordered for 27th of July, a successful attack should be made on the regularity of the proceedings.

It was further contended, on appeal, that the Circuit Judge erred in admitting the petitioner to bail without four days' notice to the counsel representing the prosecution.

The State statute provides: "When it appears, from

4 the return of the writ or otherwise, that the party is imprisoned on a criminal accusation, he shall not be discharged until sufficient notice has been given to the Attorney General, or Circuit Solicitor, or other attorney acting for the State, that he may appear and object to such discharge, if he think fit." We are not now concerned with the question whether a Judge may not grant bail in cases of emergency, when the prisoner is entitled to bail, under the Constitution, as a matter of course, the only question, being as to the amount. Here, as we have seen, he was not entitled to bail as a matter of course, but only when a *prima facie* showing of noncompliance with the requisition statute should be made and in such a case, while the statute does not prescribe the time, its clear import is that counsel shall have sufficient notice to enable them to resist the application for bail. The time is in the discretion of the Circuit Judge; but we think that there is strong reason for the position that it was error of law for the Circuit Judge to grant bail to a prisoner held on extradition proceedings, against the objection of counsel for the prosecution, on a few hours' notice. As the Court is not unanimous however on that point and its decision is not necessary in this case, it is left undecided. We hold that the Circuit Judge was in error when he granted

bail, because, on the showing before him, the petitioner was not entitled to bail.

The Circuit Judge erred, also, in admitting as evidence to impeach the requisition of the Governor of Tennessee, solemnly made over his official signature and under the great seal of the State, mere affidavits of outside persons,

5 to the effect that the Governor of Tennessee had told them that he had not signed the requisition. No argument or authority need be adduced to show that such a method of impeaching an official document is not only contrary to the rules of evidence, but would be an intolerable impugning by the judiciary of the most solemn communications between the highest executives of sovereign States.

On the other hand, the Circuit Judge was clearly right in considering the telegram from Governor Blease, and that from Governor Hooper to Governor Blease indicating a withdrawal of the requisition. But even these tele-

6 grams were not sufficient authority to warrant the Circuit Judge's holding that the requisition had been revoked. They were of value only as justifying a continuation of the hearing to a future day, so as to give Governor Hooper an opportunity to withdraw his requisition by a formal communication to Governor Blease to that import. Governor Blease expressed accurately the force to be given to them when he requested Judge Sease to continue the *habeas corpus* proceedings until he could get the substance of the telegrams authenticated under the seal of the State of Tennessee. This was no doubt the view of the Circuit Judge also who had before him, in addition to the documents above referred to, a communication from Governor Hooper to Governor Blease withdrawing the message of revocation, for he does not rest his order of discharge on the ground that the requisition had been withdrawn.

The final question is whether there was error in considering and adjudicating the petition, and discharging the petitioner in his absence. The petitioner did not appear accord-

ing to the terms of the bond, but submitted a physician's affidavit to the effect that he was too sick to leave his home in the city of Macon. Whether this affidavit was sufficient to warrant a further continuance would have been in the discretion of the Circuit Judge, if the petitioner had been properly discharged; but the principle is well settled in this State that when an accused person gives bail for his appearance at a future time for the adjudication of the question whether his body shall be held in custody or released, he cannot have his right to discharge adjudicated, unless he is actually in the presence of the Court or in the custody of an officer subject to the Court's order. If he fails to appear without legal excuse, his bail will be forfeited, and his application for the inquiry as to the legality of his arrest and detention will be considered abandoned. If he offers sufficient excuse for not appearing, then the cause must be continued until it is possible for him to appear. In *habeas corpus* proceedings, the whole matter before the judicial officer is whether the accused shall be released or remanded to custody. Unless he is present in person or subject to the order of the Court, it is manifest the Court cannot make effective its judgment against the person. A preliminary hearing demanded by the prisoner falls under the same principle. In considering the point, as applied to a preliminary hearing, the Court said in *State v. Rabens*, 79 S. C. 542, 60 S. E. 442: "A preliminary examination must have one of three results, dependent on the decision of the magistrate; the discharge of the defendant; the taking of bail for his appearance to answer the indictment; or his imprisonment. It may be the magistrate in the absence of the defendant could adjudge his discharge, but to take bail from the defendant or commit him to jail, it was manifestly necessary for him to be present in person. The defendant could not demand that the magistrate go through the empty form of conducting an examination which could have no efficient result. By failing to appear in person, he had for-

feited the recognizance (*State v. Minton*, 19 S. C. 280), and he waived his preliminary examination when by voluntary absence he made it impossible for the magistrate to enforce his judgment."

The judgment of this Court is that the order of Judge Sease be reversed, and that the petitioner be required to appear in person before Judge Sease on a day to be designated by him, and that he then be remanded to the custody of the sheriff of Spartanburg county to be surrendered to the proper officer of the State of Tennessee, unless it shall officially appear that the requisition of the Governor of Tennessee or the mandate of the Governor of the State of South Carolina has been revoked.

Reversed.

Remittitur held up for thirty days to permit appellant to obtain writ of error to United States Supreme Court.

8628

MERCK v. MERCK.

1. **DEEDS—ISSUES.**—The evidence here as to the execution and delivery of the deed in question warranted submitting the issue of execution and delivery to the jury.
2. **ESTOPPEL—WAIVER—PLEADINGS—PURCHASER FOR VALUE.**—It is here found that respondent did not waive his right to insist upon the doctrine of estoppel of a grantor by his negligence in putting a deed after execution where the grantee could get it and record it from contending the deed was never delivered, which acts induced others to buy the land. Such acts amount to estoppel *in pais* and need not be pleaded. Distinction between purchaser for value without notice and estoppel by negligence stated.

Before MEMMINGER, J., Pickens, March term, 1912.

Action by Daniel M. Merck *et al.* against Lawrence C. Merck *et al.* Plaintiffs appeal.

Messrs. Cothran, Dean & Cothran, J. E. Breazeale and J. E. Boggs, for appellants.

Messrs. Cothran, Dean & Cothran cite: *No presumption arises from execution of deed of its delivery*: 1 Devlin on Deeds 516; 63 Cal. 493; 131 N. C. 216; 10 Rich. Eq. 219; 52 S. C. 472; 19 S. C. 216; 3 Strob. 107; 93 S. C., 71; 57 S. C. 174; 11 Rich. 303. *Declarations of grantor as to execution and delivery*: 2 Wig. Ev., sec. 1471; 9 L. R. A. (N. S.) 1136; 3 Brev. 40; 1 Dev. 395, 474; 2 Jones Real P., sec. 1217; 90 S. W. 617; 27 N. C. 105; 76 N. E. 846; 82 S. C. 264; 75 Ga. 452; 2 Hill Ch. 411; 23 S. C. 91; 84 N. E. 639. *Under the pleadings and facts of this case respondent is not entitled to rely on the defense of estoppel*: 81 S. C. 329; 27 S. C. 235; 1 Bay 241; 31 S. C. 153; 82 S. C. 24; 89 S. C. 394; 84 S. C. 429; 122 U. S. 241; 89 S. C. 395; 52 S. C. 408; 7 L. R. A. (N. S.) 712; 34 Am. Dec. 517; 2 Eq. Jur. Pom., sec. 687; 16 Cyc. 772; 9 L. R. A. (N. S.) 1136; 83 U. S. 326; 7 L. R. A. (N. S.) 1019; 42 N. E. 988; 7 C. B. (N. S.) 447; 97 U. S. 369; 40 L. R. A. 498; 37 L. R. A. 780; 54 N. E. 565; Big. Estop. 483, 485; 81 S. W. 343; 100 Am. St. R. 557; 3 L. R. A. 576; 8 Rich. 230; 30 Wis. 55; 1 Devlin 411.

Mr. J. P. Carey, contra, cites: *Plaintiffs are estopped by the acts of their ancestor from insisting the deed was not delivered*: 67 S. C. 453; 86 S. C. 545; 93 S. C. 287. *Estoppel by negligence is not same as purchaser for value without notice*: 81 S. C. 329; 31 S. C. 153; 84 S. C. 426; 122 U. S. 241; 100 U. S. 578; 16 Cyc. 744; 55 L. R. A. 745; 9 S. C. 20; 10 S. C. 449; 42 S. C. 170; 13 Am. Dec. 406. *Proof of execution*: 2 Wig. Ev., sec. 1302; 96 Ga. 1; 19 Ves. Jr. 494; 1 Mill. Con. R. 336; Rice Eq. 244; 8 Rich.

135; 50 S. C. 103; 11 S. C. 429; 74 S. C. 144; 14 Ency. Ev. 782; 23 How. 353; 16 S. C. 142. *When grantor signs by mark, proof of signature of witness is sufficient:* 1 Mill. Con. 336; 11 S. C. 429; 74 S. C. 144. *Recording of deed is evidence of delivery:* 81 S. C. 453; 52 S. C. 472.

July 29, 1913. The opinion of the Court was delivered by

MR. CHIEF JUSTICE GARY. This is the third appeal herein; the first is reported in 83 S. C. 329, 65 S. E. 347, and the second in 89 S. C. 347.

The following statement appears in the record:

"This is an action instituted in the Court of Common Pleas for Pickens county on December 22, 1906, by the plaintiffs as heirs at law, children of one Blumer Merck, for the partition of a certain tract of land in Pickens county, described in the complaint, which formerly belonged to Blumer Merck, now deceased.

"The defendants, Lawrence C. Merck, son of Blumer Merck, and Ella Burton, B. Stewart and K. Stewart, children of Parthena Stewart, a predeceased daughter of Blumer Merck, were made parties defendant as tenants in common with the plaintiff. None of them answered the complaint.

"The defendant, W. B. Mann, answered the complaint denying title in the plaintiffs, and setting up a claim of title in fee in himself.

"The case was tried before Hon. R. W. Memminger, presiding Judge, at Pickens, March term, 1912.

"The legal issues of title were submitted to a jury; the jury found a verdict in favor of the defendant, W. B. Mann, that he was entitled to the possession of the land in dispute, and thereupon the presiding Judge signed an order confirming the verdict of the jury and dismissing the complaint. Upon this decree and verdict, judgment was duly entered up by the said defendant, W. B. Mann, against the

plaintiffs, from which the plaintiffs above-named have appealed to this Court."

The opinions on the former appeals, especially the first, state the facts in detail.

There are four exceptions, but it will not be necessary to consider them *seriatim*, as the appellants' attorneys have discussed them under two heads, the first of which is as follows: "Is the testimony offered by the defendant,

1 Mann, upon the subject of the execution and delivery of the deed from Blumer Merck to L. C. Merck of such character as to constitute some evidence of the complete execution and delivery of the deed, and so entitled the defendant, Mann, to have the issue of complete execution and delivery submitted to the jury?"

During the trial which resulted in the second appeal (89 S. C. 347), this Court, after sustaining the ruling of his Honor, the Circuit Judge, that M. F. Hester was not a competent witness, to prove the execution of the deed from Blumer Merck to L. C. Merck, on the ground that he was disqualified under section 400 (now 438) of the Code, proceeded as follows:

"The defendant, Mann, was in this plight: Mrs. L. C. Merck, one of the persons whose names were subscribed as witnesses to the alleged deed from Blumer Merck to L. C. Merck, was hostile and upon being put on the stand, testified in effect that the deed was not delivered. The other witness, Hester, was excluded because disqualified by interest. Under these conditions the defendant, Mann, had a right to introduce other testimony, tending to prove the execution of the deed; the evidence of the handwriting of the witnesses, of the grantor's acknowledgment of the validity of the deed after its execution, and of any facts tending to show that the deed had been executed, was clearly admissible. Land titles would be very insecure if they should fail whenever the subscribing witnesses might deny, that they witnessed the execution of a deed, or might become

for any cause incompetent to testify to its execution. It is true, in proving a deed, the subscribing witnesses must be produced or their absence accounted for, but manifestly the title cannot be made to depend entirely on their testimony. Whenever the witnesses are dead or inaccessible, or have become incapacitated, or deny the execution or their presence, or for any cause are unable or unwilling to prove the execution, then other evidence may be introduced. This is a principle of general recognition. (Citing authorities.) On this principle, the Court erred also in holding, that the admission of Blumer Merck, that he had conveyed the lands to his son, L. C. Merck, were not admissible as evidence of the execution of the deed, but only to show the character of the possession. Such admission, together with testimony as to the handwriting of the grantor, and of the witnesses, as to the independent possession and control of the lands by the grantee, and as to the recording of the deed, were all admissible, either to support the testimony of the subscribing witnesses, that the deed had been executed, or in substitution of the testimony of the subscribing witnesses, if that testimony, without fault of the party in interest, was not available, or was adverse. * * * As the case is to go back for a new trial, we refrain from any discussion or expression of opinion as to the facts further than to say, that we think there was a *scintilla* of evidence, for the consideration of the jury, on the issue of estoppel."

The appellants' attorneys thus summarize the testimony introduced by the defendant, for the purpose of proving the execution and delivery of the deed from Blumer Merck to L. C. Merck.

"The handwriting of M. F. Hester and that of Lizzie Merck, whose signatures appear as subscribing witnesses, we will assume has been proved.

"The handwriting of M. F. Hester in the signature of Blumer Merck, by his mark, we will assume has been proved.

"Four witnesses testified, that at different times they had heard Blumer Merck say, after the date of the deed, that he had deeded the land to L. C. Merck.

"The fact that the deed was recorded in the R. M. C. office of Pickens county on December 10, 1904, nearly three years after its date.

"That after the death of Blumer Merck, L. C. Merck was in possession of the land, claiming title thereto under said deed, and conveyed same to M. F. Hester, besides having exercised other acts of ownership, such as cultivating the land, mortgaging it and returning it for taxation, all within the brief period of from May to September, 1905."

The testimony tending to establish said facts was admissible under the ruling of the Court, which we have just quoted; and if his Honor, the presiding Judge, had undertaken to determine its force and effect, he would have invaded the province of the jury.

The second question discussed by the appellants' attorneys is as follows: "Did the presiding Judge err in submitting to the jury the issue of estoppel, based upon the alleged negligence of Blumer Merck in making a

2 deed complete on its face, lacking only delivery to make it a good conveyance, and then leaving it where the grantee named in the paper could easily take it, thus inducing others to accept him as the real owner of the land, and instructing the jury, that upon the solution of said issue, his title would be good, even if the deed of Blumer Merck had never been delivered?"

The appellants' attorneys contended, that the defendant was not entitled to the benefit of this doctrine, for the following reasons, which constitute their specifications of error in this particular:

"This defense is based upon the doctrine of estoppel, which in turn is based upon the plea of purchaser for value without notice, both of which defenses and pleas, were

expressly in open Court repudiated and waived by counsel for the defendant, Mann.

“Under the pleadings, testimony, and admission of counsel, the question of Blumer Merck’s negligence as affecting the issue of the delivery of the deed was not an issue in the case.”

On the first appeal (83 S. C. 329) the Court used this language:

“On the question of delivery, the plaintiffs submitted the following request: ‘Even if properly executed, the deed does not have effect as a deed, unless it be shown that it was duly delivered by Blumer Merck to L. C. Merck, or to some one for him. If Blumer Merck never parted with, or intended to part with, the possession of the deed; if he retained possession of it, placed it away with his papers and never delivered it to L. C. Merck, or to any one for him; if, while it was in Blumer Merck’s possession, it was surreptitiously taken away from his place of safe-keeping, without his knowledge or consent and placed on record, I charge you that under these circumstances, the law declares that the deed has not been delivered, and is, therefore, invalid.’ This is correct, as a general statement of the law. (Citing authorities.) Counsel for defendant now insists, however, the request was properly refused, because it left out of view the question of estoppel from negligence. His argument is, that Blumer Merck and his heirs might have been estopped from disputing Mann’s title by negligence on his part in making a deed complete on its face, and lacking only delivery to make it a good conveyance, and then leaving it where the grantee, named in the paper, could easily take it and thus induce others to accept him as the real owner of the land; and that, therefore, Mann’s title might be good, even if the deed of Blumer Merck had never been delivered. Neither the requests nor the charge of the Circuit Judge indicate that the issue of negligence was made on the trial, and it may be unfair to appellants to say it

should have been incorporated in this request. But it was earnestly pressed in the argument that the issue of negligence was made on the trial, as arising out of the evidence. That being so, the request above quoted was not sound, with the request of negligence left out of view."

It will thus be seen, that the exceptions raising this question can not be sustained, unless there was waiver of the right to insist upon estoppel in this respect. We, therefore, proceed to the consideration of the question, whether the defendant waived such right.

After stating the principles announced in the former decision in this case, his Honor, the presiding Judge, thus charged the jury, as to the undecided issues then before the Court:

"Now it appears to this Court that, after all these appeals and with the record as we have it before us now, there are no great legal complications about this matter; and, after the statement of counsel for the defendant, Mann, here in open Court, that they are not contending for, nor relying on these abstruse doctrines of equitable estoppel as such, or purchaser for value without notice, that the issues are very clearly narrowed down.

First. "Was the alleged deed from Blumer Merck to Lawrence Merck executed and delivered in compliance with law? If not, Mann loses.

Second. "If it was so executed and delivered, was it obtained by fraud? If so, Mann loses, otherwise he wins.

And third. "If executed, has its delivery been shown by such evidence of carelessness on the part of Blumer Merck, as would prevent the parties claiming that nondelivery has not been shown? Now, as to this last point on the question of carelessness, I charge you and dispose of that question by citing and charging you the law upon the point, as laid down in the first appeal, as follows (reading same): * * * I simply add the element of carelessness to the charge, as refused there by Judge Klugh, which makes it accord-

ing to the decision a correct declaration of the law on that point. I simply add to the refused request. So you see, I charge you that as the law, adding to it that you have the right to take into consideration, upon the question of delivery, that matter of negligence as laid down there, and say whether or not there was a delivery."

The plaintiffs' ninth request was as follows: "The defendant, W. B. Mann, is not entitled upon this issue to assume the position of a *bona fide* purchaser for value without notice, for the reasons:

(a) "Such defense must be pleaded, and it has not been done in this case.

(b) "It is essential to the plea of *bona fide* purchaser for value without notice, that the defendant shall have paid in full the purchase price. The defendant admits that he purchased the land for \$6,000, paid \$1,200 cash, and gave his note, secured by mortgage for \$4,800, no part of which has been paid, except a small portion of interest.

(c) "At most, the defendant would only be entitled to that plea *pro tanto*, and that on the equity side of this case." * * *

The following endorsement thereon shows why it was not charged: "Cary don't claim it." (See 83 S. C. 339.)

The Circuit Judge made similar endorsements on other requests, relative to the plea of purchaser for valuable consideration without notice.

The plaintiffs' fifth request was as follows: "If the jury believe from the evidence that after signing the alleged deed, Blumer Merck never parted or intended to part with the possession of the deed, and never intended that it should take effect as a deed, until after his death; that he retained possession of the deed, placed it away with his papers and never delivered it to L. C. Merck, nor to any one for him; that while the deed was in possession of Blumer Merck, it was surreptitiously taken away from his place of safe-keeping, without his knowledge or consent and placed on record:

I say, if you believe these facts to have been established by the evidence, then I charge you, that under these circumstances, the law declares that the deed was never delivered and is invalid." After reading it to the jury, his Honor said: "That, of course, I charge you, as a more detailed explanation, but take that in connection with that matter I explained to you of negligence. These requests don't go quite far enough. You have to add that element to them to make them a complete statement of the law."

The presiding Judge also charged the jury as follows: "If, however, you decide these issues in his favor, that is, decide in favor of the execution and delivery of the deed, you will proceed to the inquiry, as to whether or not it was obtained by fraud. You have heard the reply read, as to what fraud the heirs claim against the deed, that there was a combination between these people to obtain this deed from the old man, and that that was carried out, and that, therefore, the deed is void on that account, and they charge Mann with being cognizant of this fraud, but his counsel, as I stated, declared that on this point, they rely upon what they claim is the absolute failure to show fraud in the original transaction, and are not resting upon a claim that if you found fraud, Mann would still have a good title, as being a purchaser without knowledge or notice of the alleged fraud, and this simplifies the issue very much for you and is something of which the plaintiffs can not complain."

From the foregoing it appears that the defendant did not intend to waive his right to insist upon the doctrine of estoppel, arising out of the *negligence* of Blumer Merck, nor did the Circuit Judge so understand him. Furthermore, when the presiding Judge stated "that the issues are very clearly narrowed down" to the three which he mentioned, one of which was: "If executed, has its delivery been shown by such evidence of carelessness, on the part of Blumer Merck, as would prevent the parties claiming, that nondelivery has not been shown?" it was the duty of plain-

tiff's counsel to call such supposed error in stating the issues to the attention of the Court, in case it was intended to rely upon it as a ground of appeal, otherwise such objection was waived.

The Circuit Judge drew a distinction between the plea of purchaser for valuable consideration without notice, and estoppel by negligence; and, while he held that the issue as to estoppel by negligence was then before the Court, he also held that the defendant did not insist upon the plea of purchaser for valuable consideration without notice.

The authorities show that there is a well recognized distinction between such issues.

The right of the defendant to rely upon the negligence of Blumer Merck, whereby others were induced to become purchasers of the land, falls under the head of estoppel *in pais*, which need not be pleaded.

The rule is thus stated in *Scarborough v. Woodley*, 81 S. C. 329, 62 S. E. 405: "It is not necessary in this State to plead estoppel (*Lites v. Addison*, 27 S. C. 235, 3 S. E. 24); and, therefore, the defendant had the right, under his general denial, to introduce evidence of estoppel and on such evidence have the issue of estoppel submitted to the jury." While, on the other hand, "the defense of *bona fide* purchaser without notice is an equitable defense, must be set out in the answer, and must be sustained by party who erects it as a shield." *Lupo v. True*, 16 S. C. 587.

In the recent case of *Sullivan v. Moore*, 84 S. C. 426, 65 S. E. 108, which was also an action to recover the possession of land, the Court thus stated the rule:

"The appellants' first contention is, that the issue of estoppel is equitable in its nature, and, therefore, should have been tried by the Court, and not submitted to the jury on the issue of legal title. The position is not tenable. The rule is thus stated in *Drexel v. Berney*, 122 U. S. 241: 'Estoppels of this character, as distinguished from estoppels by record or by deed, are called equitable estoppels. It is

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not meant thereby that they are recognizable only in courts of equity, for they are commonly enforced in actions at law, as was fully shown in *Dickerson v. Colgrove*, 100 U. S. 578. But it does not follow, because equitable estoppels may originate legal, as distinguished from equitable rights, that it may not be necessary in particular cases, to resort to a court of equity, in order to make them available. All that can properly be said is, that in order to justify a resort to the court of equity, it is necessary to show some ground of equity, other than the estoppel itself, whereby the party entitled to the benefit of it is prevented from making it available in a Court of law. In other words, the case must be one where the forms of law are used to defeat that which in equity constitutes the right. Such a case is one for equitable interposition.' The right to prove against the plaintiff, estoppel by conduct as a defense to an action to recover possession of land, was recognized in *Marines v. Goblet*, 31 S. C. 153, on the authority of *Lessee of Tarrant v. Terry*, 1 Bay 241."

Judgment affirmed.

8629

BECK v. NORTHWESTERN R. R. CO.

AMENDING PLEADINGS—DISCRETION—ANSWER.—A Circuit Judge has the power to permit an answer of a railroad company in a suit for damages for taking the soil of another, in which it claims the right to the soil, to be amended to set up that the soil was removed by an independent contractor as there is no abuse of discretion shown here. *Divided Court.*

Before WILSON, J., Sumter, October, 1912. Affirmed.

Action by Julia V. Beck against Northwestern Railroad Company. Plaintiff appeals.

Messrs. L. D. Jennings and R. D. Epps, for appellant, cite: *As to amendment*: 74 S. C. 236; 80 S. C. 213; 81 S. C. 574; 91 S. C. 51. *As to abuse of discretion*: 47 S. C. 498; 92 S. C. 33.

Messrs. Lee & Moise and Purdy & Bland, contra, cite: *As to amendment*: 81 S. C. 578; 30 S. C. 575; 74 S. C. 236; 30 S. C. 564; 53 S. C. 577, 259. *As to abuse of discretion*: 92 S. C. 297; 31 S. C. 378.

July 30, 1913. The opinion of the Court was delivered by

MR. CHIEF JUSTICE GARY. This is an appeal from an order allowing the defendant to amend its answer in certain particulars.

The exceptions raise two questions, the first of which is whether his Honor, the Circuit Judge, had the power to allow the amendments.

The case of *Taylor v. R. R.*, 81 S. C. 574, 62 S. E. 1113, which has been affirmed in numerous subsequent cases, is conclusive of this question, and shows that the exceptions raising this question cannot be sustained.

The next question is whether there was an abuse of discretion.

The appellant has failed to satisfy this Court that there was error in this respect, and the exceptions raising this question are also overruled.

Appeal dismissed.

MR. JUSTICE WATTS. I concur only in the result in the opinion of the Chief Justice, for the reason that I am loath to disturb the action of the Circuit Judge in the exercise of his discretion unless there is abuse, and I cannot say there is. As to what effect the amendment allowed will have in view of the decision of this Court in *Abbott v. Lumber Co.*, 93 S. C. 131, it is at this time unnecessary to consider.

MR. JUSTICE FRASER, *dissenting*. I cannot concur in the opinion of the Chief Justice.

The plaintiff claims to own a tract of land through which the defendant is operating a railroad, and that the railroad company is making excavations on the land along the railroad and carrying away the soil. That the land belongs to the plaintiff and she is damaged thereby. She demands damages and asks for an injunction.

The suit was commenced in July, 1910. Judge Memminger issued a restraining order. The case shows that the defendant made a motion before Judge Wilson on the 25th July, 1910, to dissolve the restraining order and it was granted.

The case shows that "during the argument on this motion, one of the points made by one of the attorneys for the defendant was that the defendant company was well able to respond in damages, and therefore the restraining order should be dissolved." The answer of the defendant was sworn to on the 6th August, 1910. The answer admitted the acts complained of and justified under claim of right. In October, 1912, the defendant applied to Judge Wilson for, and obtained, an order allowing it to amend its answer setting up the defense of "independent contractors." From this order this appeal is taken.

I think this appeal ought to be sustained and the order appealed from reversed for the following reasons:

Amendments are ordinarily within the discretion of the Circuit Judge, but there are limits.

1. The defendant claimed to own the land and justified under a claim of right. It admitted that it was making the excavations and that it was using the dirt for its own purposes, and asked the Court to allow it to continue. If they were doing this through Williams & Company, then under *Abbott v. Sumter Lumber Company*, 93 S. C. 131, Williams & Company were not independent contractors, but

servants, and defendant is responsible for their acts. The amendment was either unnecessary or unavailing.

2. The case shows that Judge Memminger issued a restraining order. That this order was vacated. "During the argument on this motion one of the points made by one of the attorneys for the defendant was that the defendant company was well able to respond in damages and therefore the restraining order should be dissolved."

It seems to me that when a defendant comes into Court and admits the acts, justifies by a claim of right and induces the Court to allow it to continue to do the things complained of, claiming that it is well able to respond in damages, an amendment setting up the defense of independent contractors ought not to be allowed. Certainly not, unless there is a clear showing that the independent contractors are also amply able to respond in damages, and that they are within the jurisdiction of the Court. The defendant is asking a favor, not demanding a right. The defendant knew in August, 1910, when it framed its answer, all the facts about the independent contractor, that it knew in October, 1912, when it secured the order allowing the amendment. Of course, the high character of the parties in this case negative a design to do what is wrong, but this case is a precedent and it is easy to see what abuses may creep into the administration of justice in this State if this amendment is allowed. A person or corporation "well able to respond in damages" can look over the State and take whatever property it pleases. If stopped in the taking, it says, "Yes, I took it. It is mine, but I am well able to respond in damages." The Court withholds its hand. It takes the balance. The litigation is continued for years until it has gotten all it wants, and then shall it be allowed to amend and say, "I am not liable and never was?"

I do not think the amendment should be allowed.

MR. JUSTICE HYDRICK *concurs*.

8630

GIBSON v. BETHEA.

1. FORECLOSURE—JUDGMENTS.—Where in a foreclosure one defendant seeks to foreclose his mortgage against his codefendant the note secured thereby not then being due without serving his answer upon his codefendant, upon the usual allegations in the complaint that such defendant claims some interest by mortgage, it is proper to open the judgment and permit the mortgagor to answer and defend.
2. *IBID.*—ATTORNEY'S FEES.—In such case attorney's fee for defendant mortgagee should not be adjudged.

Before SHIPP, J., Marion, September, 1912. Affirmed.

Action by Rebecca A. Gibson, guardian, against Florence A. Bethea *et al.* Defendant, Bank of Marion, appeals from the following Circuit order:

"The defendant, Florence A. Bethea, moved before me at my chambers at Florence, South Carolina, on the 27th day of June, A. D. 1912, to vacate and set aside the judgment in the above stated case and to require her codefendant, the Bank of Marion, to serve its answer upon her and to permit her, the said Florence A. Bethea, to answer the same. This motion was resisted by the Bank of Marion and the affidavits submitted in support of and against the motion are irreconcilable. It appears, however, that judgment was rendered in favor of the Bank of Marion against its codefendant, Florence A. Bethea, for the foreclosure of a mortgage given to secure a promissory note which was not then due, and that the judgment included attorney's fees for the foreclosure of said mortgage. It appears also that the answer of the Bank of Marion was not served upon its codefendant, Florence A. Bethea, and it is probable that if it had been so served, she would at least have resisted the demand for attorney's fees, to which the bank was not then entitled. Without deciding the issues raised by said affidavits, I am clearly of the opinion that the defendant, Florence A.

Bethea, is entitled to her day in Court and to be permitted to answer the cross-answer of her codefendant, the Bank of Marion, as she may be advised. The judgment should remain undisturbed except in so far as it relates to the note and mortgage from the defendant, Florence A. Bethea, and her husband, P. Y. Bethea, to her codefendant, the Bank of Marion. * * *

Mr. L. D. Lide, for appellant, cites: *Should defendant mortgagor have been served with appellant's answer?* 83 S. C. 491; 71 S. C. 439; 55 S. C. 510; 47 S. C. 460; 68 L. R. A. 323; *Wiltsie on Foreclosure* 451; 24 S. C. 48. *Attorney's fees:* 33 S. C. 283; 77 S. C. 223. *Judgment may be opened, but not set aside unless void:* 90 S. C. 552.

Messrs. James R. Coggeshall, Geo. E. Dargan and B. Wofford Wait, for defendant, mortgagor, contra, cite: *Was judgment within the scope of the complaints?* 47 S. C. 460; 83 S. C. 491. *Is section 225 of Code of Proc. applicable?* 82 S. C. 505; 81 S. C. 288. *Order affects surplus only and is in furtherance of justice:* 56 S. C. 21; 64 S. C. 343; 82 S. C. 505.

July 30, 1913. The opinion of the Court was delivered by

MR. JUSTICE FRASER. The following statement of facts appears in the "Case."

"This action was brought by the plaintiff to foreclose a mortgage given to her by the defendant, Florence A. Bethea. Bank of Marion was made a party defendant, because it held two mortgages on the premises given by this codefendant, Florence A. Bethea. One of these mortgages had been given to Atlantic National Bank, and subsequently was assigned to Bank of Marion, and there is no controversy as to this mortgage. On April 10, 1911, a decree for foreclosure was granted. On December 27, 1911, notice was

given by Florence A. Bethea, through her attorneys, that she would move on the first day of the next term of the Court of Common Pleas for Marion county to vacate and set aside the said decree, and that she would move on January 4, 1912, for an order staying the proceedings until the motion to vacate the judgment could be heard. Judge Shipp granted an order staying the proceedings, and the motion to vacate the judgment was to have been heard at the next term of Court, but by agreement of counsel, it was taken up at chambers on June 27, 1912. On September 27, 1912, Judge Shipp passed an order adjudging that the decree herein, in so far as it relates to the note and mortgage made by Florence A. Bethea and her husband, P. Y. Bethea, to Bank of Marion be vacated and set aside, and that Bank of Marion be required to serve upon the said Florence A. Bethea its answer in this case. Bank of Marion gave due notice of appeal from this order, and the case comes before this Court upon the exceptions set forth in the record."

The defendant, Bank of Marion, did not serve its answer on its codefendant, Mrs. Bethea, although its answer asked for the foreclosure of its two mortgages. Mrs. Bethea admits the plaintiff's mortgage and one of the defendant's mortgages, but denies the other. Judge Shipp opened the default as to the disputed mortgages. From this order Bank of Marion appealed.

It will not be necessary to consider the exceptions separately. They all question the right of the Judge to open the default and modify the judgment and are all overruled. It

was a matter of discretion, and Judge Shipp made a
1 wise use of his discretion. It appeared from the showing made before him that there was a real issue between Mrs. Bethea and Bank of Marion. It was not his province to determine the facts upon the showing, but to determine whether there was a real controversy or not, and whether she had had "her day in Court." He found that

there was a controversy. This is indisputable. He found that she has not had her day in Court. She has not.

It is said that defendants are not required to serve their answer on their codefendants when the relief granted arises out of the facts alleged in the complaint. That is true, but when they have an answer in which affirmative relief is asked against the codefendant and do not serve the answer on the defendant, they are liable to have the judgment set aside.

Having held that the order was within the discretion of the Circuit Judge, and that there was no abuse of discretion,

no other question arises except to say that he was also
2 right in holding that the attorney's fee was not due at the time of the order. The recent case, *Coley v. Coley*, 94 S. C. 383, shows that an attorney's fee of ten per cent. is not a matter of course, even though provided for in the note and mortgage.

The order appealed from is affirmed.

MR. JUSTICE HYDRICK. The rule in equity is that the Court can adjust equities between defendants, when they arise out of allegations in the complaint, supported by proof. But when one defendant seeks affirmative relief against another, which does not so arise, he must serve a cross-answer, stating the facts out of which the relief which he prays for arises.

The complaint alleges that Bank of Marion "claims a lien upon said premises prior to plaintiff's lien, by virtue of certain mortgages on said premises, one of which said mortgages * * * was assigned and transferred to Bank of Marion by the Atlantic National Bank."

This sufficiently alleges that said bank held at least two mortgages over the premises to warrant the Court in giving judgment thereon in the absence of any defense. Parties should not be allowed to trifle with the Court by fail-

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ing to answer and defend under such an allegation, and, when judgment is given against them, seek to set it aside.

I concur in affirming the order appealed from, because this motion was based upon other grounds which warranted the Court in guarding it.

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SMYLY v. COLLETON CYPRESS CO.

1. REAL PROPERTY.—Possession of land may be proved by a number of facts and circumstances, neither of which might show possession alone, but all of which considered together would satisfy the jury which is the tribunal to try such issue.
2. RECORDING DEEDS.—THE DOCTRINE OF PURCHASER FOR VALUE WITHOUT NOTICE can only be relied on by one claiming title from the same source as the plaintiff. The record of a deed is only notice to those claiming through the same grantor.

Before PRINCE, J., Colleton, November term, 1912.
Affirmed.

Action by C. M. Smyly *et al.* against Colleton Cypress Company. Defendant appeals.

Messrs. Howell & Gruber, for appellant, cite: *Acts proved do not show possession*: Rice 375; 1 N. & McC. 218; 2 N. & McC. 579; 25 S. C. 252. *Duty to direct a verdict*: 91 S. C. 462.

Messrs. Padgett, Lemacks & Moorner and H. R. Padgett, contra, cite: *Possession at time of trespass is sufficient*: 86 S. C. 358; 71 S. C. 327; 59 S. C. 131; 3 Strob. 473; 61 S. C. 311; 3 Hill 265; 60 S. C. 392. *Location is for the jury*: 40 S. C. 134; 93 S. C. 569; 50 S. C. 293; 74 S. C. 63. *Possession is for the jury*: 1 Hill 88; 53 S. C. 24; 45 S. C. 312; 62 S. C. 193; 50 S. C. 293; 2 McC. 289; 25 S. C.

252; 18 S. C. 554. *Possession of part is possession of all covered by plat*: 2 M. & McC. 138; 3 Strob. 465, 479; 25 S. C. 181; 2 Hill 466. *Innocent purchaser cannot apply here*: 2 Pom. Eq. Jur. 735; 31 S. C. 325; 14 S. C. 312; 67 S. C. 377; 20 S. C. 58; 28 S. C. 580; 17 S. C. 563. *Possession is notice of title*: 22 S. C. 32; 29 S. C. 147; 72 S. C. 235; 79 S. C. 286; 82 S. C. 378. *Defense of innocent purchaser must be pleaded*: 16 S. C. 586; 59 S. C. 147; 2 Pom. Eq. Jur. 784.

July 31, 1913. The opinion of the Court was delivered by

MR. CHIEF JUSTICE GARY. This is an action of *quare clausum fregit*, to recover actual and punitive damages for trespasses, alleged to have been committed on four hundred and forty-eight acres of swamp lands, of which the plaintiffs alleged that they were in possession, and were the owners in fee.

The defendant denied, generally, the allegations of the complaint, and set up as a defense that it was a purchaser for valuable consideration without notice, actual or constructive.

At the close of the plaintiffs' testimony, the defendant made a motion for a nonsuit, on the ground that the plaintiffs totally failed to prove actual possession of the property in dispute; and, on the further ground, that they failed to prove legal title to the said property.

His Honor, the presiding Judge, refused the motion, on the ground that although the plaintiffs had failed to show title in themselves, nevertheless there was testimony tending to prove that they were in possession of the property at the time of the alleged trespasses.

The jury rendered a verdict in favor of the plaintiffs for four thousand dollars, whereupon the defendant made a motion for a new trial, which was also refused. The defendant then appealed.

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The first question that will be considered is whether there was any testimony tending to show that the
1 plaintiffs were in possession of the lands, at the time of the alleged trespasses.

The plaintiffs relied upon a number of facts and circumstances, and, while no particular one is sufficient to show that they were in possession of the lands at the time mentioned, nevertheless, when the facts are considered as a whole, they satisfy us that the nonsuit was properly refused.

The rule is thus stated in *Railroad v. Partlow*, 14 Rich. 237: "It may be that no one of the facts would, of itself, warrant the inference, and yet, when taken together, they may produce belief, which is the object of all evidence." In Greenl. Ev., sec 51a, it is said: "It is not necessary that the evidence should bear directly upon the issue. It is admissible if it tends to prove the issue, or constitutes a link in the chain of proof, although alone, it might not justify a verdict in accordance with it."

It was peculiarly a question to be determined by the jury, whether the possession of the plaintiffs was continuous, or in the nature of repeated trespasses.

We have not discussed the testimony in detail, as it would unnecessarily prolong the opinion, and subserve no useful purpose.

The next question that will be considered is whether there was error on the part of his Honor, the presid-
2 ing Judge, in ruling that the doctrine of innocent purchaser for value without notice, has no application, where people claim from different sources.

The defense of purchaser for value without notice, when it arises out of the recording acts, presents a *legal* issue to be determined by the jury. *Gregory v. Ducker*, 31 S. C. 141, 9 S. E. 780; *Hodges v. Kohn*, 67 S. C. 69, 45 S. E. 102; 2 Pom. Eq. Jur., section 736.

But whether considered in its legal or equitable aspect, it is not applicable to this case, for the reason that, as stated

by his Honor, the presiding Judge, the plaintiffs and defendants do not claim from a common source of title.

The rule is thus stated in 2 Pom. Eq. Jur., section 658: "It is not every subsequent purchaser who comes within the purview of the statute. The mere fact that subsequently to the registering of a deed of certain premises, a third person purchases the same premises from any source of title, from any grantor whatsoever claiming to own them, does not render the purchaser necessarily chargeable with notice of the prior recorded conveyance.

"The only subsequent purchaser, who is charged with notice of the record of a conveyance, is one who claims under the same grantor from the same source of titles. If two titles to the same land are distinct and conflicting, the superiority between them depends not upon their being recorded, but upon their intrinsic merits. It is a settled doctrine, therefore, that a record is only a constructive notice to subsequent purchasers deriving titles from the same grantor."

In section 735 of the same volume, it is also said: "This section will deal with the equitable doctrine of *bona fide* purchaser for a valuable consideration and without notice. The doctrine in its original form was purely equitable. Questions of priority can not, as has already been stated, arise between successive adverse estates, which are purely legal, and, therefore, can not independently of statutory permission, come before courts of law for settlement; such estates must stand or fall upon their own intrinsic merits and validity. A contest concerning priority or precedence, properly so called, can only exist where one of two claimants hold a legal and the other an equitable title, or when both hold equitable titles, and must therefore belong to the original jurisdiction of equity. Courts of equity do not have jurisdiction of suits, brought merely to establish one purely legal title against another and conflicting legal title."

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The principle was announced in *Martin v. Quattlebaum*, 3 McC. 205, that a deed to land is not affected in any way by not being recorded, except as to subsequent purchasers from the same grantor—the Court concluding its opinion as follows: “The law never meant anything so absurd as to say that if a man sold his land and made a title for it, which should not be recorded, that such title should be destroyed by another’s making a title to the same land, and having it duly recorded.”

This doctrine was affirmed in *Youngblood v. Keadle*, 1 Strob. 121. In that case Mr. Justice Wardlaw dissented, on the ground that the act of 1698, which was then under consideration, did not limit its application to those cases, in which the parties claimed from a common source of title. He, however, thus succinctly stated the general object of the recording acts: “A registry is designed for public information, and it can be searched only by indexes referring to names. No search would usually disclose conveyances made by unknown third persons, of the same property which has been mortgaged or sold by an instrument, whose validity is under investigation; and often the conveyance of a third person if found, although containing the same property, might not afford the means of identification.”

See, also, *Richardson v. A. C. L. Corporation*, 93 S. C. 254.

These cases are in accord with the general doctrine elsewhere. In 39 Cyc. 1721, we find the following: “It is sometimes said that the record of a conveyance which is entitled to be recorded, is constructive notice to all the world. But this is too broad and unqualified an enunciation of the doctrine. It is constructive notice only to those who are bound to search for it; subsequent purchasers claiming under the same grantor, or through one who is the common source of title.” At page 1728 the same author says: “The record of an instrument not in the chain

of title through which the purchaser claims, is not constructive notice to the purchaser, the record being notice only to those who claim under or through the same grantor."

Judgment affirmed.

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MATHESON v. MARION COUNTY LUMBER CO.

DEEDS.—THE TIMBER CONTRACT in question construed to mean that if within ten years from its date, the grantee pay the grantor six per cent. per annum on the contract price the term for removing the timber may be extended for ten years.

Before Jos. A. McCULLOUGH, special Judge, Marlboro, December, 1912. Affirmed.

Action by G. D. Matheson against Marion County Lumber Company. Defendant appeals.

Messrs. Townsend & Rogers and M. C. Woods, for appellant, cite: *Rules of construction*: 23 S. C. 232; 2 Strob. 156; 42 S. C. 45; 79 S. C. 168.

Messrs. Stevenson, Stevenson & Prince, contra, cite: *A subsequent act will not recall life into an expired estate*: 90 S. C. 179, 163; 52 S. E. 773; 55 L. R. A. 513; 6 L. R. A. (N. S.) 469. *Exceptions to the rule requiring deed to be construed most strongly against grantor*: 2 Kent. 556; 17 Ency. 14; 127 Am. R. 125; 21 Ency. 924; 144 U. S. 402; 70 S. E. 474, 629.

August 1, 1913. The opinion of the Court was delivered by

MR. JUSTICE FRASER. The appellant makes the following very clear statement of his case:

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"On December 12th, 1896, A. J. Matheson conveyed to Cape Fear Lumber Company the timber on certain lands. The deed of conveyance contained the following provision:

" 'The Cape Fear Lumber Company shall have ten years from the 30th of September, A. D. 1898, to cut and remove said timber, and if at the end of that time they have not removed said timber, then by payment of six per cent. per annum upon the said purchase price, within the next ten years or till said timber has been removed, they can have and may take ten years longer to remove said timber.'

"On August 24, 1911, the plaintiff, G. D. Matheson, successor in title to A. J. Matheson, brought this action against Marion County Lumber Company, the successor in title of Cape Fear Lumber Company, for the removal of a cloud upon his title, alleging:

" 'That neither the Cape Fear Lumber Company nor its successors and assigns nor the defendant exercised the rights under said deed to cut and remove said timber, or any of the other rights granted therein, upon the tracts owned by the plaintiff, or upon the other tracts mentioned in said deed during the time limited; nor did they procure an extension of said term during its currency or at all, and all rights which are purported to have been conveyed in said deed have determined and the said timber and easements have reverted, and are now the property of the plaintiff.'

"The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, in that it appeared from the face of the complaint that the time limit of the grant had not expired. His Honor, Jos. A. McCullough, special Judge presiding at the Fall term of the Court of Common Pleas for Marlboro county, overruled the demurrer, and the case now comes before this Court on the exceptions set forth in the record to the decree of his Honor.

"In reaching a conclusion as to the proper construction of the grant before the Court, we first desire to call the atten-

tion of the Court to the fact that the principles announced by the Court in *Flagler v. Lumber Corporation*, 89 S. C. 328, and the other cases construing grants with wording similar to the wording of the grant in the Flagler case, have no application whatever to the case now under consideration, and the principle for which we now contend in nowise conflicts with the principles already announced by the Court in such cases. The question the Court is now called upon to answer is, when the interest money should be paid under the words:

“The Cape Fear Lumber Company shall have ten years from the 30th of September, A. D. 1898, to cut and remove said timber, and if at the end of that time they have not removed said timber, then by the payment of six per cent. per annum upon said purchase price, within the next ten years, or till said timber has been removed, etc.’”

Appellant is correct in his contention that the intention of the parties as expressed in the instrument governs and that the province of the Court does not extend to the reformation of improvident contracts, but to the enforcement of such contracts as the parties have made. It must be remembered that the whole instrument must be considered and except in rare instances, one clause must not dominate the whole. If the rule was different the appellant has not and has never had any right to the timber itself. The grant is, “timber ways, rights of ways and easements.” There is no grant of the timber itself in the granting clause and only when the instrument is considered as a whole and its intention liberally construed is there a conveyance of the timber. The appellant claims that it has ten years after the expiration of the original term in which to pay the interest, or the Court must disregard the words, “within the next ten years.” In other words, appellant claims that it can pay interest at the rate of six per cent. per annum at any time within ten years from the date of the expiration of its original term, and that extends the term for an additional term of ten years. If

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the contract had said "at the rate of six per cent. per annum," another question would be presented. The contract does not say that. It says, "then by the payment of six per cent. per annum * * * within ten years or till said timber has been removed." It is not claimed that the right to revive the contract extended beyond the additional ten years, yet if the removal was within the ten years, then the payment of interest was "*till*" removal. "*Till*" carries with it the idea of continued action, so that, if the removal was within the ten years, there must have been continuous payments of interest or the right to revive was gone. If the payment of the interest was not made within ten years, the right was gone. So, the only way to keep the second term alive was by the payment of six per cent. per annum, according to the contract. The demurrer admits that it has not been done. "Per annum" means "by the year." Rapalge & Lawrence Law Dictionary.

Now substitute the meaning and we have: "The Cape Fear Lumber Company shall have ten years from the 30th of September, A. D. 1898, to cut and remove said timber, and if at the end of that time they have not removed said timber, then by the payment of six per cent. *by the year* upon said purchase price, within the next ten years or till said timber has been removed, etc."

So, we see that the contract that these people made for themselves, is a contract that requires a payment of interest by the year in order to keep alive the extended time.

The judgment overruling the demurrer is sustained.

MESSRS. JUSTICES HYDRICK and WATTS *concur in the result.*

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ROBERTSON v. WESTERN UNION TELEGRAPH CO.

1. **WAIVER—OFFICE HOURS.**—There was sufficient evidence in this case to carry to the jury the issue of waiver of office hours.
2. **TELEGRAPH COMPANIES—PRINCIPAL AND AGENT.**—Where an agent of a telegraph company receives and transmits messages out of office hours in violation of the carrier's instructions, the carrier is responsible if the agent was acting within the scope of his employment.
3. **VERDICT—JURISDICTION.**—This Court has no jurisdiction to set aside a verdict because excessive unless it is so excessive as to manifest capriciousness or fraud.
4. **TELEGRAPH COMPANIES—OFFICE HOURS—WAIVER.**—Where there was evidence to the effect that the office hours at the receiving office had been habitually disregarded before the receipt of the message in question, the carrier cannot relieve itself of liability for failure to deliver on the ground that the telegram did not reach its destination until after office hours.
5. **IBID.—CHARGE—HARMLESS ERROR.**—Failure to give a request that there was no special agreement to deliver a telegram, *is held* to have been harmless here as there was evidence tending to show a general waiver of office hours and because of the charge as to the burden of showing such agreement, and as to duty of jury to disregard the contention if there was no evidence to support it.

Before SHIPP, J., Edgefield, October, 1912. Affirmed.

Action by Sallie Robertson against Western Union Telegraph Company. Defendant appeals on the following exceptions:

(1) "In that his Honor erred in admitting the testimony of J. L. Mims as to office hours at Edgefield and the reasonableness thereof—the Court ruling as follows: 'I have ruled that you can put in the paper and you can prove what you please as to conditions in Edgefield. Now, the question as to reasonableness of the Ninety-Six office hours would depend on conditions at Ninety-Six.'

"Telegraph Office Hours."

"'Until further notice the following office hours will be observed by the Western Union Telegraph Company's office at this city:

"'Daily, except Sunday, open from eight a. m. to eleven a. m. and from three-thirty p. m. to five p. m. In case of urgent necessity and death, special services will be rendered to the public. In such cases, if the operator is not in the office, he will be found at his residence, and will respond promptly to any calls. J. R. Nicholson, Operator and Manager.'

"The error being that the office hours and conditions in Edgefield was not an issue in this case, and the evidence concerning the same was irrelevant and should have been excluded.

(2) "In that his Honor erred in admitting the testimony of M. A. Taylor as to conditions in Edgefield over the objection of defendant: 'How many banks are there here? Two. How many oil mills? One. How many cotton mills? One. How many stores? Twelve or thirteen, I suppose. How many population? Between eighteen hundred and two thousand. You knew about the amount of work that went to the office when you were the telegraph operator? Yes, sir; at that time. State to the jury whether or not the office hours at Edgefield from eight a. m. to six p. m. are reasonable?

"(Objected to by Mr. Evans.)

"'I do not think it is reasonable, not in the months of July and August, because it is not night at that time. Now state to the jury whether or not the office hours published in that paper in your judgment are reasonable? They have it 7:30 p. m. Yes, sir? That would be reasonable at that time of the year, unless they had a night operator. But in the summer time, do you think that would be reasonable office hours? No, sir.'

"The error being that said testimony was irrelevant and responsive to no issue in the case.

(3) "In that his Honor erred in charging the jury the second request of plaintiff as follows: 2d. 'It is not necessary that all offices shall have the same hours, and I leave it to you to decide what the office hours of the defendant at Ninety-Six were in July, 1910, whether they were reasonable.'

"The error being that there was no evidence in the case tending to show that the office hours at Ninety-Six at said time were unreasonable.

(4) "In that his Honor erred in charging the third request of the plaintiff as follows: 'While the occasional transmission and delivery of a telegram after office hours will not be sufficient to establish a waiver of the regulation, yet the habitual failure of the agent to observe the office hours may be considered by the jury in determining whether or not such regulations were waived.'

"The error being that there was no evidence of waiver of office hours in the case, and the charge was responsive to no issue in the case and was prejudicial to the rights of defendant.

(5) "In that his Honor erred in charging the fourth request of plaintiff, to wit: 'If a telegraph company have a regulation that one or more of its offices shall close at a certain hour, yet it may bind itself to deliver after closing time by agreement.'

"The error being that there was no allegation and no evidence tending to show an agreement on the part of the defendant to deliver the message after office hours, and the charge was responsive to no issue of law or fact in the case and was prejudicial to defendant.

(6) "In that his Honor erred in not charging the third request of defendant, to wit: 3d. 'The jury is charged that there is no evidence in this case that the suffering of the plaintiff, as alleged in the complaint, was the direct, natural

and proximate result of any negligence on the part of the defendant, and your verdict should be for the defendant.'

"The error being that said request was a correct principle of law, applicable to the case.

(7) "In that his Honor erred in not charging the eighth request of the defendant, to wit: 'The jury is charged that there is no evidence in this case tending to show that the office hours at Ninety-Six, the place at which the message was received, were unreasonable, and your verdict should be for the defendant.'

"The error being that said request contained a correct principle of law applicable to the facts of the case.

(8) "In that his Honor erred in refusing to charge the ninth request of the defendant, to wit: 'I charge you that there is no evidence of any agreement on the part of the telegraph company to deliver the telegram sued upon in this case.'

"The error being that said request contained a correct principle of law applicable to the case, and the failure to charge it was prejudicial to the rights of defendant.

(9) "In that his Honor erred in refusing to charge the 11th request of the defendant, to wit: 'The jury is charged that the undisputed evidence in this case shows that the office hours of the defendant at Ninety-Six were from eight o'clock a. m. until six o'clock p. m., and such hours are reasonable. The complaint alleges that the telegram sued upon was filed at Edgefield for transmission about six o'clock p. m., and had to go through a relay office at Augusta, Georgia. I charge you that there is no evidence that the defendant waived its regular office hours, and you should find for the defendant.'

"The error being that said request contained a correct principle of law applicable to the case, and the failure to charge the same was prejudicial to defendant.

(10) "In that his Honor erred in refusing to grant defendant's motion for a new trial upon the following grounds:

1st. "That the verdict is excessive.

2d. "That there is no testimony whatever that the suffering was the direct and proximate result of any act or delict on the part of the telegraph company.

3d. "As to office hours, there is not a scintilla of evidence to contradict the fact, which was proven on the part of the telegraph company, that the office hours at Ninety-Six, from eight a. m. to six p. m., were reasonable hours.

4th. "On the ground that there is no evidence of any waiver as to office hours at Ninety-Six."

Messrs. John Gary Evans and N. G. Evans, for appellant, cite: Reasonable office hours at one place does not prove hours reasonable at another: 24 Fed. 119; 71 S. C. 307, 390; 73 S. C. 521. If no dispute as to reasonableness of office hours, the issue is one of law: 83 S. C. 8; 71 S. C. 307. There was no proof of waiver of office hours: 75 S. C. 271. A mere promise to get a message through is not a guaranty: 75 S. C. 184; 37 Cyc. 1669; 53 S. W. 712.

Messrs. Thurmond & Nicholson, contra, cite: Practically all the questions raised in this appeal are res judicata: 90 S. C. 425; 65 S. C. 510; 78 S. C. 105. Where the evidence is conflicting, reasonableness of office hours is for jury: 83 S. C. 8.

The opinion in this case was filed on June 12, but remittitur held up on petition for rehearing until

August 2, 1913. The opinion of the Court was delivered by

MR. CHIEF JUSTICE GARY. This is an action for damages, alleged to have been sustained by the plaintiff, through

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the negligence of the defendant, in failing to deliver a telegram within a reasonable time.

The plaintiff and her husband lived at Ninety-Six, S. C., and worked in the factory. The husband went to Edgefield, S. C., on a bicycle, to visit his sister, Mrs. Kate Waits, and becoming suddenly ill sent the following telegram to his wife on the 17th of July, 1910: "I am sick; we will be home tomorrow on train."

He failed to arrive at home, on the 18th of July, and his wife, on that day, sent to him the following message: "When will you be home?" And in reply thereto, Mrs. Kate Waits (in whose care the telegram was addressed), on the 18th of July, 1910, at six o'clock p. m., delivered to the defendant, for transmission, the following telegram: "Jerry is on way on bicycle; left at ten." The said telegram was not delivered to the plaintiff until the next day at ten o'clock a. m., July 19, 1910, and as the result of the failure to deliver the last mentioned telegram, the plaintiff alleges, that she suffered mental anguish, from seven o'clock p. m., of 18th July, 1910, until 10 o'clock p. m. of that day, when her husband, Jerry Robertson, returned home.

The defendant interposed the defense that its office hours at Ninety-Six for receiving and transmitting messages, were from eight o'clock in the morning, until six o'clock in the evening; that the message was not delivered for transmission, until the office hours at Ninety-Six had closed; and that the same was not received at said office, until next morning, when it was promptly delivered.

The jury rendered a verdict in favor of the plaintiff, for three hundred and seventy-five dollars, and the defendant appealed upon exceptions, which will be reported.

The first question that will be considered is,

1 whether there was any testimony tending to show, that the defendant waived the right to insist upon the office hours, mentioned in the defense.

G. M. Wilson, a witness for the defendant, and who was its agent at Ninety-Six at the time hereinbefore mentioned, thus testified: "You say your office hours were from eight to six? Yes, sir. But as a matter of fact, did you not make it a custom to receive and deliver messages after that time? If anyone would come along, we would do it; we would not do it for anyone else. As a matter of fact, if you will examine one of those telegrams here, you will see that it was received at 7:15 and sent at 7:16; and you stated that you all were in the habit of receiving and delivering messages after that time?

Mr. Evans: "He never said that.

Mr. Nicholson: "I am asking him.

"Now, frankly, were you all not in the habit of receiving and sending messages after six o'clock? Any time we were in the office, we would do it; I would; I have sent them at four o'clock in the morning. And you state that at that time, you were in the habit of receiving and delivering telegrams for people after six o'clock? We would do it.

Mr. Evans: "State whether or not the mere fact that you occasionally transmitted or received a telegram, state whether or not that was in your official capacity as affecting your office hours? No, sir. It did not? No, sir.

Mr. Nicholson: "That is a matter for the jury.

The Court: "Let him state what his rules were.

Mr. Evans: "What were the rules that you observed as to the opening and closing of your office for Western Union business? From eight a. m. until six p. m.

"Were those rules promulgated by the company and observed by you? It is the sixteen-hour law that fixes it. They are not allowed to work longer than ten hours? Ten hours and not over sixteen. That is fixed by law? That is what they told us. And everything that you did after that was simply out of your own good heart? Yes, sir. And an act of huminty on your part? Yes, sir. If you were in your office, after the office was closed, for business.

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and your door was closed, and someone came to you with a death message, what would you do? I would send it. You would try your best to send it? Yes, sir. Would you think you were doing wrong, or would you think you were acting as humanity would dictate to anyone?

Mr. Nicholson: "We object to that.

Mr. Evans: "What you would do would not be required of the company, but as an act of humanity?

Mr. Thurmond: "That is a matter of opinion.

The Court: "He can say whether or not the rules of the company required him to do it.

The Court: "He has already said that the rules of the company did not require him to do it, but that he would send them.

Mr. Evans: "Counsel comes in and tries to show habitual custom, they charge that it was habitual; I am asking the witness these questions so that counsel can see whether he is leading the witness.

The Court: "He knows whether he did it in obedience to the rules of the company, or whether he did it on his own responsibility.

Mr. Evans: "Would you do it merely as an accommodation? Yes, sir. And as not required by the company? They could not force me. When you sent them after that, in what capacity were you acting? In my own capacity. And out of your own good heart, as any proper man would do? I was trying to use common sense.

Mr. Nicholson: "We object to that, and my friend knows it is not competent."

It will thus be seen, that there was sufficient testimony, to require the submission of the case to the jury, upon this question, unless it should be held, that the defendant was not liable for the acts of its agent in receiving and delivering messages, *after* the regular office hours.

The agent was unquestionably acting within the scope of his employment. Therefore even if his acts were in viola-

tion of the telegraph company's instructions, this would not absolve it from liability. *Reynolds v. Witte*, 13 S.

2 S. 5; *Rucker v. Smoke*, 37 S. C. 377, 16 S. E. 40; *Hutchinson v. Real Estate Co.*, 65 S. C. 75, 43 S. E. 295; *Mitchell v. Leech*, 69 S. C. 413, 48 S. E. 290; *Williams v. Tolbert*, 76 S. C. 211, 56 S. E. 908; *Brown v. Tel. Co.*, 82 S. C. 173, 63 S. E. 744.

The next question to be determined is whether his Honor, the presiding Judge, erred in allowing the plaintiff to introduce testimony, as to the reasonableness of the office hours at Edgefield.

In the first place, the Circuit Judge ruled that the question of reasonableness must be determined, with reference to the office hours at Ninety-Six, and not at Edgefield; and in the second place, even if there was error it was not prejudicial, as the vital question was not whether the office hours were reasonable, but whether they were *waived*.

The next assignment of error relates to the refusal of the Circuit Judge, to charge the defendant's request, that there was no evidence that the suffering of the plaintiff, was the direct and proximate result of the defendant's negligence.

The exceptions raising this question must be overruled, as the record shows that there was testimony tending to prove such fact.

The last question for consideration is, whether
3 there was error on the part of the presiding Judge in refusing to set aside the verdict on the ground that it was excessive.

That is not a question for this Court, unless the verdict was so excessive as to manifest capriciousness or fraud, which does not appear in this case.

These conclusions practically dispose of all the questions raised by the exceptions.

Judgment affirmed.

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August 2. PER CURIAM. This is a petition for a rehearing upon two grounds, which will be considered in regular order.

First Ground. The defendant, in its answer, interposed the following as a defense: "That the office hours of the defendant company at Ninety-Six, for the conduct of business, are from eight o'clock in the morning, until six
4 o'clock in the evening, and if any delay occurred in the delivery of the message complained of, it was by reason of the fact, that said message was not offered for transmission, until after the office at Ninety-Six had closed, and the same was not received at Ninety-Six, until next morning, and was promptly delivered.

The allegation as to the office hours at Ninety-Six was put in issue, without a formal denial.

The plaintiff introduced testimony for the purpose of showing, that the defendant's office hours had been changed, by waiving its right to insist upon them, on numerous occasions prior to the time, when the message herein was delivered for transmission.

The operator at Ninety-Six, thus testified: "Now, frankly, were you all not in the habit of sending messages, after six o'clock? Any time we were in the office we would do it; I would; I have sent them at four o'clock in the morning. And you state that at that time, you were in the habit of receiving and delivering telegrams for people, after six o'clock? We would do it."

If the office hours at Ninety-Six were thus changed, then the defendant could not escape liability by showing, "That the office at Ninety-Six was closed, at the time the message was filed in Edgefield for transmission; that the telegram never reached Ninety-Six until 8 o'clock Tuesday morning; that the undisputed testimony shows, that the agent at Edgefield stated to Mr. Ouzts, the sender of the message, that the office hours at Ninety-Six, were from 8 o'clock a. m. until 6

o'clock p. m., and that the message would have to lie over in Augusta, Ga., the relay office."

It seems to us, that appellant's counsel has misconceived the object, for which the testimony was introduced. It was not for the purpose of showing waiver, *in this particular case*, but that the office hours had been *previously* changed, in so far as the *general public* were concerned, by habitually disregarding them.

The verdict shows that this fact was established, to the satisfaction of the jury.

This ground can not be sustained.

Second Ground. This ground is based upon the assumption, that the Court failed to consider the fifth and eighth exceptions.

It is true, these exceptions were not considered specifically, but the Court, in concluding its opinion, said:

5 "These conclusions practically dispose of all the questions raised by the exceptions."

The fifth exception was as follows: "In that his Honor erred in charging the fourth request of plaintiff, to wit: 'If a telegraph company have a regulation, that one or more of its offices shall close at a certain hour, yet it may bind itself to deliver, after closing time, by agreement.' The error being, that there was no obligation, and no evidence tending to show an agreement, on the part of the defendant to deliver the message after office hours, and the charge was responsive to no issue of law or fact in the case, and was prejudicial to defendant."

In charging the said request, his honor, the presiding Judge, said: "Of course, I do not mean to express any opinion, as to whether there was any agreement; if there was an agreement, you will have to find it from the testimony; if there is no evidence of any agreement, then that would not apply."

The eighth exception was as follows: "In that his Honor erred, in refusing to charge the ninth request of the defend-

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ant, to wit: 'I charge you that there is no evidence of any agreement, on the part of the telegraph company, to deliver the telegram sued upon in this case.' The error being, that said request contained a correct principle of law applicable to the case, and the failure to charge it, was prejudicial to the rights of defendant."

In regard to the ninth request, his Honor, the presiding Judge, said: "Now, as to the ninth request, they ask me to tell the jury, that there is no evidence on a certain point. I do not remember what the testimony was; I cannot keep it all in my mind.

Mr. Evans: "Is that the one as to the agreement?"

The Court: "Yes, sir.

Mr. Evans: "That is just in reply to their request, and there was no such agreement.

Mr. Nicholson: "We submit there was such an agreement.

The Court: "I will decline this ninth request, because that is a question for the jury. I will tell the jury, when it comes to the question of an agreement to deliver the message out of office hours, it is incumbent on the plaintiff to show, that there has been such an agreement, and unless the plaintiff shows you by the preponderance of the testimony that there was such an agreement, then you will have to ignore it; if you do not find any evidence of a special agreement to deliver it out of the office hours, just disregard that; and if you find that the telegram was received outside of office hours, the company is not bound to deliver it, except in office hours, unless the company made a special agreement to deliver it after office hours, or unless the company had waived the requirements as to office hours."

While there was no evidence of a special agreement, as to this telegram, and the Circuit Judge erred in not so charging, yet we are satisfied that the error was not prejudicial, for the reason that, as we have shown, there was testimony tending to show a general waiver of the office hours. In view of this fact, and the explicit instructions above quoted,

to the effect that the burden was on the plaintiff to prove such agreement, and that if she had failed to do so, or there was no evidence of it, the jury must disregard that contention, we are satisfied that the error was harmless.

It is the judgment of this Court, that the petition be dismissed, and the order heretofore granted staying the remittitur be revoked.

8634

STILL v. CREECH.

STILL v. EDGELLE.

WILLS—LIMITATION OF ESTATES—LIFE ESTATES.—A devise to L. during her natural life and at her death to the issue of her body and in case she should die leaving no such issue, then over, carries to L. only a life estate.

Before RICE, J., Barnwell, October, 1912. Affirmed.

Two cases (1) Florence Still against Harlan L. Creech, and (2) same against Isabelle C. Edgelle. Defendants appeal.

Messrs. J. A. Willis and J. O. Patterson and Bates & Simms, for appellants. *Messrs. Willis & Patterson* cite: 3 Rich. Eq. 279; 7 Wall. 285; 77 S. C. 231; 91 S. C. 487; 1 Rich. Eq. 404; 3 Hill 193; 17 S. C. 551; 13 S. C. 117; 5 Rich. Eq. 443; 14 S. C. 610; 3 Hill 193; 48 S. C. 440; 52 S. C. 563; 7 Rich. Eq. 362; 9 Rich. 63; 3 Hill 193.

Messrs. Bates & Simms cite: 23 S. C. 47; 7 Rich. 407; 2 Strob. Eq. 175.

Messrs. R. C. Holman and B. M. Darlington, contra, cite: 4 Kent 228; Bail. Eq. 31; 7 Rich. Eq. 407; 26 S. C. 450; 23

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S. C. 455; 39 S. C. 143; 69 S. C. 294; 59 S. C. 162; 91 S. C. 293.

August 7, 1913. The opinion of the Court was delivered by

MR. CHIEF JUSTICE GARY. These two actions were brought to recover possession of the tracts of land, described in the respective complaints, and, by consent, were heard together.

The appeal is from the decree of his Honor, the Circuit Judge, construing the will of Andrew Lee.

From the agreed statement of facts it appears, that Andrew Lee died in 1878, leaving of force his last will and testament, which was as follows:

"I give and bequeath unto my beloved wife, Anna Lee (after payment of my just debts), all my estate, both real and personal of whatever kind or nature, during her natural life, and at her death whatever may remain at that time, I give and bequeath unto Laura Sanders (my adopted daughter), daughter of William S. Sanders, during her natural life, and at her death to the lawful heirs of her body, share and share alike, but should she die leaving no such issue alive at her death, then to go to her brothers and sisters and the survivors of them. And the property so bequeathed, is not to be subject to the debts or contracts of any husband, she may have or intermarry with. But to be and remain for her sole and separate use and behoof."

That Laura Sanders intermarried with one Stinson, and died in December, 1903, leaving a son, who died intestate and unmarried, and a daughter, Florence, the plaintiff herein, who intermarried with one Still; and she and her children were at the time these actions were commenced, and are now, the only surviving issue of the said Laura Sanders.

That Anna Lee, widow of the testator, died prior to the death of Laura Sanders.

That Laura Sanders and some of her brothers and sisters, were living at the time of the execution of the said will, and several of her brothers and sisters, were living at the time of her death.

That the lands described in the complaint, were alienated by Laura Sanders, after the birth, and during the lifetime of issue born to her.

His Honor, the Circuit Judge, in construing the will, held, that Laura Sanders, took only a life estate, and that the heirs of her body living at the time of her death, took as purchasers, and not in fee conditional.

The exceptions assign error in said ruling.

The ruling of the Circuit Judge is sustained by the case of *McCorkle v. Black*, 7 Rich. Eq. 407, which is cited with approval in *Williams v. Kibler*, 10 S. C. 414; *Mendenhall v. Mower*, 16 S. C. 303; *Powers v. Bulwinkle*, 33 S. C. 293, 11 S. E. 971; *Gadsden v. Desportes*, 39 S. C. 131, 17 S. E. 706; *Selman v. Robertson*, 46 S. C. 262, 24 S. E. 187; *Davenport v. Eskew*, 69 S. C. 292, 48 S. E. 223; *Guy v. Osborne*, 91 S. C. 291, 74 S. E. 617.

Judgment affirmed.

MR. JUSTICE FRASER. *I dissent. I think Laura Sanders took a fee conditional and the condition being fulfilled her deed conveyed the fee.*

8635

MIMS v. ATLANTIC COAST LINE R. R. CO.

RAILROADS—ISSUES.—When there is evidence that a switch engine was run across a street in a city at a reckless rate of speed, greater than permitted by the rules of the company without a proper look-out and without warning, and that these acts were the proximate cause of the death of an employee on the tracks and the defense introduces evidence tending to show the injured person was guilty of gross contributory negligence in attempting to cross the track,

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the issues should have been sent to the jury and not determined by the Court on motion for nonsuit.

Distinguished from Drawdy v. Ry., 78 S. C. 375.

Before SPAIN, J., Richland, April, 1912. Reversed.

Action by Lizzie Mims, administratrix of Jno. J. Mims, against Atlantic Coast Line Railroad Company and S. B. Divine. Plaintiff appeals.

Messrs. Nelson, Nelson & Gettys and John H. Clifton, for appellant, cite: *On main issue*: 78 S. C. 63; 90 S. C. 462; 93 S. C. 543, 263; 47 S. C. 382; 45 S. C. 183; 76 S. C. 163; 76 S. C. 378; 78 S. C. 547.

Messrs. Barron, Moore, Barron & McKay, contra, cite: *Res gestae*: 77 S. E. 721; 86 S. C. 103. *On the main issue*: 85 S. C. 355; 94 S. C. 143; 78 S. C. 377; 81 S. C. 193.

August 9, 1913. The opinion of the Court was delivered by

MR. CHIEF JUSTICE GARY. This is an action by the plaintiff, as administratrix of John J. Mims' estate, to recover damages against the defendants, for the benefit of herself and children, on account of the death of her husband, alleged to have been caused by the joint and concurrent negligence and recklessness of the defendants.

The allegations of the complaint, material to the question under consideration, are set forth in the 4th, 5th, and 6th, paragraphs thereof, which are as follows:

4th. "That the defendant, S. B. Divine, is a citizen of the State of South Carolina, who was at the time hereinafter mentioned, a servant and employee of the defendant, Atlantic Coast Line Railroad Company, being engineer, engaged in running an engine of the defendant, used for switching and other purposes on defendant's yard at said Sumter.

5th. "On information and belief, that on or about the 19th day of December, 1910, while plaintiff's intestate was crossing Harvin street, a public street of the said city of Sumter, defendant, Atlantic Coast Line Railroad Company, carelessly, negligently, recklessly, wilfully and wantonly, ran backwards one of its engines and tender, on one of its tracks across said Harvin street, at an excessive and reckless rate of speed, and in violation of its own rules and regulations as to speed, and without having any one on the rear of said engine or tender, to keep a lookout in the direction, in which said engine and tender were being run, and in violation of its own rules, and without blowing the whistle or ringing the bell of said engine, and without giving any signal or warning whatsoever of its approach, as required by law, although, where the tracks of said defendant cross said Harvin street, is a public crossing in said city of Sumter, and carelessly, negligently, recklessly, wilfully, and wantonly ran into and over plaintiff's intestate, crushing him beneath the wheels of said tender and causing his death.

6th. "On information and belief, that the defendant, Atlantic Coast Line Railroad Company, knew or should have known, that its codefendant, S. B. Divine, was a careless and reckless engineer, nevertheless, it carelessly, negligently, recklessly, wilfully and wantonly retained the said S. B. Divine, in its employ, as switch engineer, in and about its yards at said Sumter, South Carolina."

The defendants denied the allegations of negligence and recklessness, and set up contributory negligence on the part of John J. Mims, as a defense.

At the close of all the testimony, his Honor, the presiding Judge, granted an order of nonsuit, on the ground "that the only inference to be drawn from the evidence is, that the plaintiff's intestate, John J. Mims, was guilty of gross negligence, which contributed to his injury, as a proximate cause thereof."

The appellant's exceptions assign error in said ruling.

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There was testimony tending to show, that the deceased was a car inspector, at the time of his death, and was in the employment of the defendant company, in its yards at Sumter, S. C., that one of his duties, was to inspect all trains upon their arrival in the yards; that at the time of his death, he was going across the yard and tracks, diagonally from a train which was already in the yard, to one which had just arrived, for the purpose of inspecting it; that in going from one to the other, it was necessary for him to cross Harvin street, a much traveled place, and one of the main thoroughfares of the city; that while he was thus discharging his duty, he was killed by collision with a switch engine, within a few feet of Harvin street; that the engine was running backwards without a full shifting crew, and without anyone on the back of the tender, to keep a lookout, at a rate of speed from 15 to 20 miles an hour, which was reckless, and exceeded the rate of ten miles an hour prescribed by the rules of the company; that no signal was given except the blow of the whistle, *after* Mims was struck by the engine; and, when considered in its entirety, there was reasonable ground for the jury to draw from the testimony, the inference that Mims did not know the engine was approaching, until it was in a few feet of him, as his back was turned in that direction.

In fine, there was testimony tending to prove, every material allegation of the complaint, that was put in issue.

After the introduction of testimony by the plaintiff, for the purpose of establishing the facts just mentioned, the defendants offered evidence contradictory thereof, for the purpose of showing, that they were not guilty of negligence or recklessness, and to sustain their defense, that the plaintiff's intestate was guilty of contributory negligence.

If the jury believed the testimony offered by the plaintiff, then it was unquestionably susceptible of the inference, that the injury was the direct and proximate result of negligence or recklessness, on the part of the defendants, and not of

gross negligence on the part of the plaintiff; while on the other hand, if they believe the testimony introduced in behalf of the defendants, *including that which contradicted the evidence offered in behalf of the plaintiff*, then it was susceptible of the inference, that the injury resulted directly and proximately, from the gross negligence of John J. Mims. It was, however, for the jury, not only to determine whether they believed the whole or any part of the testimony introduced by either party, but also to draw the inference therefrom.

The defendants seem to attach much importance to the testimony of L. I. Parrott, then clerk of the Court, who testified, that he heard some one ask John J. Mims, immediately after the injury: "My God, John, how did this thing happen?" and that Mims replied: "I thought I could make," or, "I thought I could cross," or some expression of that kind.

We do not, however, attach the same importance to it, on account of the subsequent testimony of this witness.

The record shows that the following took place subsequently:

Mr. Parrott, recalled:

Mr. Clifton: "In the statement you made as coming from Mr. Mims, you say that there is no absolute degree of certainty, whether he referred to his physical condition or ability to get across the track; you can say which he referred to? Whether he was in such physical condition that he was unable to get across the track, or had the time to get across? What I heard on the grounds, what the person said with reference to his physical condition, impressed my mind with the fact, that it was on account of his physical condition."

It appears from the testimony, that Mims was not then in good health physically, and the statement of the witness, is, that the remarks made by Mims had reference to his physical condition, and not to the question whether he had time to get across, on account of the proximity of the train.

His Honor, the presiding Judge, based his ruling, on the case of *Drawdy v. Ry.*, 78 S. C. 375, 58 S. E. 980, which he held to be conclusive of the present case. Upon comparison of the facts in the two cases, it will be found that they are materially different.

It is the judgment of this Court, that the order of the Circuit Court be set aside, and the case remanded to that Court for a new trial.

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ROYAL EXCHANGE ASSURANCE OF ENGLAND v. BENNETTSVILLE & CHERAW RAILROAD CO.

STUYVESANT INSURANCE CO. v. SAME.

1. THE SERVICE OF A COMPLAINT by mail, where the summons has been served regularly without the complaint, is good, if it is deposited in the postoffice on the twenty-first day after demand for service when the twentieth day falls on Sunday.

MR. JUSTICE WATTS *dissents*.

2. PROCESS.—A COMPLAINT is a mere pleading and does not partake of the nature of "process." Process defined.

Before SHIPP, J., Marlboro, May, 1911. Reversed.

Two cases (1) Royal Exchange Assurance of London, England, *et al.* against Bennettsville and Cheraw Railroad Company, and (2) Stuyvesant Insurance Company *et al.* against same defendant. Plaintiffs appeal.

Messrs. Ino. T. Seibels and James K. Owens, for appellants.

Messrs. Stevenson, Stevenson & Prince and Townsend & Rogers, contra.

August 12, 1913. The opinion of the Court was delivered by

MR. CHIEF JUSTICE GARY. These cases were heard together by consent, as they involve the same question.

The appeal is from an order of his Honor, the Circuit Judge, setting aside the service of the summons, on the ground that the complaint, which was not served with the summons, was not served upon the defendant's attorneys within the time required by the statute, after they had demanded that a copy be served upon them.

The summons stated that the complaint would be filed in the office of the clerk of the Court of Common Pleas.

The record contains the following statement of facts: "Each of the summons was served by the sheriff of Marlboro county on the agent of the defendant corporation on the 24th day of January, 1911. On February 13, 1911, counsel for defendant gave notice of appearance and demanded that copy of the complaint in each case be served on them at the office of Stevenson, Stevenson & Prince, in Planters National Bank Building, Bennetttsville, S. C., the service of which was accepted by J. K. Owens on said date, and on the 14th day of February, 1911, the said John T. Seibels received through the mail an envelope postmarked 'Bennetttsville, February 13, 7:30 p. m.,' containing in each case a notice of appearance, and demand for service upon them for a copy of the complaint, signed by Messrs. Stevenson, Stevenson & Prince, defendant's attorneys, at their office, Planters National Bank Building, Bennetttsville, S. C.

"On Monday, the 6th day of March, 1911, the twenty-first day after the said 13th day of February, 1911, the complaint in each case was prepared by the said John T. Seibels, plaintiff's attorney, and was deposited in the postoffice by his clerk and stenographer in the city of Columbia, in an envelope sealed and addressed to 'Messrs. Stevenson, Stevenson & Prince, Planters National Bank Building, Bennetttsville, S. C.,' with sufficient postage prepaid.

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"On Tuesday, March 7, 1911, defendant's counsel received by mail a copy of the complaint enclosed in an envelope postmarked 'Columbia, S. C., March 6, 1911, 9:30 p. m.'"

It will be observed, that the last day, upon which the plaintiffs had the right to serve a copy of the complaint, was Sunday.

Section 180 of the Code, is as follows: "A copy of the complaint need not be served with the summons. In such case, the summons must state, where the complaint is or will be filed, and if the defendant, within twenty days
1 thereafter causes notice of appearance to be given, and in person or by attorney demands, in writing, a copy of the complaint, specifying the place within the State, where it may be served, a copy thereof must, within twenty days thereafter, be served accordingly, and after said service, the defendant has twenty days to answer." * * *

Section 445 of the Code provides that "the time within which an act is to be done, shall be computed by excluding the first day and including the last. If the last day be Sunday it shall be excluded."

Section 448 provides that "service by mail may be made, where the person making the service, and the person on whom it is to be made, reside in different places, between which there is a regular common carrier by mail."

Section 454 of the Code is as follows: "The summons and the several pleadings in an action, shall be filed with the clerk of Court, within ten days after the service thereof, respectively, or the adverse party, or proof of the omission, shall be entitled without notice, to an order from a Judge, that the same be filed, within a time to be specified in the order, or be deemed abandoned."

Section 456 of the Code provides that "the provisions of this chapter shall not apply to the service of a summons, or other process, or of any paper to bring a party into contempt."

The chapter just mentioned embraces sections 448 and 454 of the Code.

In *Salley v. Ry.*, 76 S. C. 173, 56 S. C. 782, the Court thus states the rule as to the computation of time, within which an act is to be done, when the last day is Sunday: "The general rule laid down in this country is, that where an act is required to be done, in a certain number of days, exceeding a week, Sunday is not excluded in the computation; but if the number of days is less than seven, Sunday is not counted." But the Court further says: "It has been held, however, that Sunday must always be counted when the time is prescribed by statute." Thus recognizing the principle, that the rule is inapplicable when the statute prescribes the manner, in which the computation shall be made. And, as section 445 of the Code provides that Sunday shall be excluded, if it be the last day within which an act is to be done, the rule in cases, where the number of days is less than a week, has no application.

It is also contended by the appellants' attorneys, that section 448 of the Code is inapplicable, for the reason that the service of a copy of the complaint, under the circumstances herein mentioned must be regarded as process—section 456 of the Code providing, that the provisions of the chapter embracing said section, should not apply to the service of a summons, *or other process*.

In *Walters v. Laurens Cotton Mills*, 53 S. C. 155, 31 S. E. 1, it was held that a notice of appeal, deposited in the postoffice on the tenth day properly addressed and postage prepaid, was served in accordance with the statute. See, also, *Craig v. Insurance Co.*, 80 S. C. 151, 61 S. E. 423, and *State v. Gandy*, 87 S. C. 523, 70 S. E. 163.

Section 454 of the Code recognizes the distinction between the summons and the pleadings, the latter of which—pleadings—embraces the complaint.

The word "process" has been variously defined, for the reason that the context, generally, plays an important part in its construction.

"The term 'process,' comprehends all mandates of a Court issued to its officer, commanding him to prepare certain service within his official cognizance; and embraces every writ, that may be necessary to institute or carry on an action or suit and to exercise the judgment of the Court." 23 Enc. of Law 160.

Process in the sense in which it is employed in the present title, means the writ, or other formal writing issued by authority of law, for the purpose of bringing defendant into a Court of law, to answer plaintiff's demands in a civil action, although in a more technical and limited sense, the term is frequently applied only to those writs or writings, which issue out of a Court. 32 Cyc. 419-421.

In its general acceptation it means a writ, a summons, or order issued in a judicial proceeding to acquire jurisdiction of a person or his property, to expedite the hearing
2 of the cause to a final determination, or to enforce the judgment of the Court. A complaint is a mere pleading and does not partake of these characteristics.

It is the judgment of this Court that the order of the Circuit Court be reversed.

MR. JUSTICE WATTS *dissenting*. These cases were heard together on the appeal, and the facts involved and questions raised are identical. The summons in each case was served upon the defendant by the sheriff of Marlboro county, on January 24, 1911. The complaints were not served with the summons. The summons stated that the complaint "will be filed in the office of the clerk of the Court for Common Pleas for said county," and required the answer to the complaint to be served on John T. Seibels, No. 5 Clark Building, Columbia, S. C., within twenty days after service, exclusive of the day of service. The summons was subscribed by

John T. Seibels and J. K. Owens, plaintiff's attorneys. Seibels lives at Columbia, S. C., and Owens at Bennettsville, S. C. On February 13, 1911, counsel for defendant gave notice of appearance, and demanded that copy of complaint in each case be served on them at the office of Stevenson, Stevenson & Prince, in the Planters National Bank Building, Bennettsville, S. C. The service of this notice was accepted by Mr. Owens on that date, and on February 14, 1911, Mr. Seibels received this notice, by mail, at Columbia, S. C. On March 6, 1911, twenty-one days after February 13, 1911, the complaints in each case were prepared and mailed with postage prepaid, to the defendant's counsel at Bennettsville, S. C., as demanded by the notice of appearance. The defendant's counsel received the complaints so mailed next day, March 7, 1911, and forthwith returned the same to plaintiff's attorneys, as not having been served within the time prescribed by law. The complaints were not filed in the clerk of Court's office for Marlboro county, until March 22, 1911. On March 20, 1911, the defendant's counsel served notice that they appeared solely for the purpose of said motion, and would move on the twenty-fourth day of March, 1911, before his Honor, Judge Shipp, "for an order setting aside the service of summons dismissing this case for failure to file the complaint in time, and also for failure to serve the same in time under the statutes of this State." After hearing the motion, his Honor passed an order setting aside the serving of the complaints in each case on the ground that it appeared that the complaints in each of the actions were not served within twenty days in accordance with the notice, and demand of copy thereof, or pursuant to the statute in such cases made and provided, nor were the complaints filed in the office of the clerk within twenty days as stated, would be done in the summons in said actions. Upon announcing the judgment of the Court a motion was made for leave to serve the complaints at that time on the ground of surprise. The Court denied this motion, as no notice was

given the other side that any such motion would be made, but without prejudice to plaintiff's applying to any proper authority for any relief they may be entitled to under any section of the Code. The appellants appeal, and challenge the correctness of his Honor's order.

We think the appeal should be dismissed, and while we can find no ruling in this State directly on the points at issue, we find the identical language in our Code, as in the New York Code: "A copy of the complaint need not be served with the summons, in such case the summons must state where the complaint is, or will be filed; and if the defendant, within twenty days thereafter, causes notice of appearance to be given, and in person, or by attorney, demands in writing a copy of the complaint, specifying a place within the State where it may be served, a copy thereof must, within twenty days thereafter, be served accordingly," etc., etc.

"In ordinary cases twenty days are allowed after demand for service of copy of complaint, where defendant's attorney served notice of retainer, and demanded complaint at two different times, for several defendants, and after twenty days from the first service but not the last, moved to dismiss the complaint for want of service, held that the defendant might move on the proof of service of the first notice, and demand without waiting for the expiration of twenty days from the last service." *Luce v. Trumpert*, 9 How. 212.

"An order cannot be granted *ex parte* after time of serving it (the complaint) has expired giving the plaintiff further time to serve his complaint. Notice must be given, or an order to show cause." *Stevens v. Moore*, 4 Sandf. 674.

"Where the complaining party should file his pleading within a specified time, or where either party has placed his adversary in such position as to make it a duty to plead, it is requisite, that unless further time be granted, the required act should be fully performed, within the time limited, whether that time be prescribed by statute, general rules of

Court, or rule, or order to declare or plead." Ency. of Pleading and Practice, vol. 21, page 699.

Reference to footnotes made from South Carolina cases sustain this doctrine. *McBryde v. Floyd*, 2 Bail. 209; *Stevens v. Thayer*, 2 Bay; *Kennedy v. Smith*, 1 Brev. 203; *Murphy v. Sumner*, 1 Hill 216; *Wright v. Higginbottom*, 1 Nott. and Mc., page 8; *Perry v. Richardson*, 3 Rich Law 60; *State Bank v. Tone*, 2 Spears 501.

I think judgment should be affirmed, however, without prejudice to the right of the plaintiffs-appellants, to apply to the Circuit Court for leave to serve the complaint *nunc pro tunc* upon such terms as the Court may impose as provided for in Judge Shipp's order.

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SIMPSON v. COX.

1. **USURY—NOTES.**—The maker of a note cannot set up the plea of usury in a suit by the payee of the third renewal for usurious interest paid to the bank which discounted the second renewal and received the usurious interest.
2. **EXCEPTIONS.**—Under an exception alleging error in finding so much due as principal, so much as interest and so much as attorney's fees on a note because so much was not due, the point that a note of payee should not have been adjudged to be secured by the mortgage in issue should not be considered.

The office and form of exceptions stated.

Before PRINCE, J., Anderson, August, 1912. Affirmed.

Action by W. A. Simpson against J. F. Cox, Lipscomb & Russell Co. and R. E. Allen Bro. Co. Defendant, Cox, appeals.

Messrs. Martin, Greene & Earle, for appellant, cite:
Mortgage cannot be held for debt or renewals not covered

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by its terms: 20 Ency. 963, 925; 27 Cyc. 1073-4, 1655. *Defense of usury*: 77 S. C. 141; 39 Cyc. 1002-3; 2 McC. 176; 3 Brev. 54.

Messrs. Bonham, Watkins & Allen, contra, cite: Exception not made below will not be considered here: 93 S. C. 61; 92 S. C. 418, 105, 123, 14. *Usury paid in an executed contract cannot be set up against another debt*: 77 S. C. 141; 62 S. C. 178; 67 S. C. 553; 37 S. C. 59.

August 16, 1913. The opinion of the Court was delivered by

MR. JUSTICE HYDRICK. On July 31, 1908, the defendant, Cox, gave plaintiff his note for \$2,300, payable six months after date, and secured same by mortgage. Plaintiff discounted the note at the Farmers Bank of Williamston. Defendant made several payments on the note at the bank, and, on April 24, 1909, renewed it for \$1,341.09, due six months thereafter, plaintiff endorsing the renewal. On November 15, 1909, the Farmers Bank of Williamston demanded payment. Defendant having failed to pay it, plaintiff agreed that if the bank would have defendant execute a renewal note for the amount due, he would endorse it and get the Bank of Piedmont to discount it. At that time, Cox owed the Farmers Bank of Williamston another note for \$75, which was, by consent of the parties, included in the renewal note, which was discounted by the Bank of Piedmont. Defendant having failed to pay this last note at maturity, plaintiff paid it to the bank, and brought this action for foreclosure.

The answer set up the following defenses: A general denial; partial failure of consideration; usury, and a counterclaim for usurious interest paid.

The referee found against all the defenses and reported the amount due as alleged in the complaint. On exceptions to the report, only two questions were argued to the Court,

to wit: that the referee erred (1) in not sustaining the plea of usury; and (2) in including the \$75 note in the mortgage debt.

The Court held that the last note was usurious, because discount at the rate of eight per cent. per annum was added to its face, when, by its terms, it was to bear only straight interest at that rate, and decreed accordingly. But

1 with regard to defendant's contention, that the first renewal note was also usurious for the same reason, the Court held, that, as the transaction was entirely between the defendant and the Farmers Bank of Williamston, the plaintiff getting none of the usurious interest charged by the bank on that renewal, and having nothing to do with it, except to endorse the renewal note, which was again voluntarily renewed by the defendant, the transaction was an executed one, and even though that renewal note was usurious, the plea of usury therein could not avail the defendant against the plaintiff.

Upon this point, we agree with the Circuit Court. With regard to that renewal, the defendant is in the same position he would have been if he had paid the note at maturity. In that event, he would have had no cause of action against the plaintiff, who did not receive any usurious interest, or any benefit thereof. On the other hand, if plaintiff had been allowed to recover in this action according to the face of the last renewal note, he would have received the benefit of usury therein.

The Court refused to consider the assignment of error in including the \$75 note in the mortgage debt, on the ground that none of defendant's exceptions properly raised that question, holding that defendant's fifth exception,

2 which was alone relied upon for that purpose, was too general. That exception was as follows: "Error of said special referee on finding as a matter of fact and so reporting the amount to be due plaintiff on said debt to be fourteen hundred and ninety dollars principal and one hun-

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dred and forty-nine dollars interest plus attorney's fee, it being shown by the preponderance of the testimony that the amount due plaintiff is not so much as that amount and said special referee committed error in concluding that plaintiff is entitled to judgment of foreclosure against the defendant, Cox, for such amount.

We agree with the Circuit Court in holding that this exception was too general. The office of an exception is to point out—specify—the error complained of. Turning to the exception, we find that it assigns error in finding \$1,490 principal, and \$149 interest, and attorney's fees to be due, on the ground that so much was not due. Now, how could the Court or opposing counsel tell from the exception what the error complained of was? Was it in the principal, or in the interest, or in the attorney's fees? If the latter, whether the amount was too great, or whether the contention was that nothing at all was recoverable? Or, was it because of an error in calculation of interest, or because of the claim that one of the defenses set up should have been sustained; and, if the latter, which one? And why? For error of law or of fact? Any one or all of the matters mentioned could have been argued under the general language of the exception, as well as the point that the amount of the \$75 note could not have been legally found to be a part of the debt secured by the mortgage, which shows conclusively that the exception did not *specify* the error complained of, which it is always easy to do, in a few words and without repetition, when one has clearly outlined in his own mind the assignment of error which he desires to bring to the attention of the Court. In this case, it would have been sufficient to say that the referee erred "in including in the amount found to be due on the mortgage debt the amount of defendant's note for \$75 to the Farmers Bank of Williamston."

The rule that exceptions must specify the errors complained of is simple and easy to comply with. It was

intended to let the Court and opposing counsel see at a glance what points of law or fact the appellant desires the Court to review, and it is not fair, either to the Court or opposing counsel, to allow an appellant, by the generality of the language of his exceptions, to so mask the questions which he will ask the Court to review, that they can be ascertained only by the aid of his own explanation of the purpose concealed in the generality of his language, thereby, perhaps, also allowing them to serve as a cover for an afterthought.

Keeping in mind the purpose of exceptions, it is clear that it is rarely, if ever, necessary for them to be long or involved. They should contain no repetition or argument. They may properly contain the ground or reason upon which the assignment of error is predicated, when it is not clearly shown or necessarily implied in the assignment itself, but argument should be reserved for the briefs of counsel. Each assignment of error relied upon should be clearly and concisely stated in a separate exception, so that no exception should embrace more than one specification of error, unless it is under proper subdivisions. On the other hand, only one exception should be taken to bring up the same assignment of error. It is scarcely worth while to waste the time and tax the patience of the Court with a point that is so attenuated that it requires to be stated in many ways to be seen and understood. Again, counsel sometimes file separate exceptions on the ground that the Court erred in refusing a nonsuit, the direction of a verdict, and a motion for a new trial, all on the same ground. One exception should cover them all. We recently heard a personal injury case in which there were thirty-nine pages of exceptions. Every point made could have been fully and clearly stated within the limits of three or four pages at most. To classify and analyze the exceptions in such a case, in order that they may be intelligently disposed of, is an unnecessary and vexatious strain upon the Court and opposing counsel, and the Court would have been warranted in dismissing the appeal, because

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the exceptions were not taken in the manner prescribed by its rules. Besides, there is great danger that a single grain of wheat may be effectually concealed in so much chaff.

We take this occasion to make these observations and suggestions in the hope that, in future, exceptions, both to the Circuit Court and to this Court, will be short, clear and concise, specifying the errors complained of without circumlocution, argumentation or repetition, and that only one exception will be taken to raise the same point. Counsel may act upon these suggestions with the assurance that all objections which their exceptions specify will receive the consideration of the Court.

Judgment affirmed.

8640

STATE v. WADE.

1. FORNICATION—EVIDENCE.—THE CONFESSIONS of one indicted with another for fornication is not evidence against the other.
2. *IBID.*—INDICTMENT—SEVERANCE.—Under a joint indictment against two persons for fornication, a severance in the trial and the verdict may be had.

Before DEVORE, J., Greenville, September term, 1912.
Reversed.

Indictment against B. G. Wade and Meta Wade for fornication. Defendants appeal.

Mr. J. R. Martin and John C. Henry, for appellants, cite: Confessions inadmissible: 27 S. C. 27; 1 Strob. 156; 3 Ency. 343; 13 S. C. 395; 5 Rich. 399; 15 S. C. 545. Confession of one not admissible against the other: 1 Cyc. 960; 15 S. C. 540; 39 S. C. 57. One may be convicted: 30 S. C. 85; 49 Am. St. R. 208; 109 N. C. 764; 1 Cyc. 958; 41 Am. R. 248, 321.

Solicitor Proctor A. Bonham, contra.

August 26, 1913. The opinion of the Court was delivered by

MR. JUSTICE HYDRICK. The appellants were tried, in their absence, for fornication. With the exception of certain admissions of the defendant, Meta Wade, proved by the deputy sheriff who executed the warrant of arrest, the evidence was wholly circumstantial. Stated most strongly against the defendants, the substance of it was that B. G. Wade was a widower, whose family consisted of a son and two daughters. At the time of the trial, the son was nineteen, and the daughters were thirteen and fourteen years old, respectively. He had also an older son, who was the husband of the defendant, Meta. Some years ago,—possibly from three to five, though the testimony does not disclose the date, even approximately,—Meta and her husband moved into the home of B. G. Wade, and lived with him, as members of his family. Sometime after that (another period not fixed by the evidence), Meta's husband died, and she continued to live in the house of her father-in-law, as a member of his family. After the death of her husband, she gave birth to two children. One died shortly after its birth. The other was about two years old at the time of the trial. Meta's statement to the deputy sheriff was to the effect that, for several years, she had been wanting to leave B. G. Wade, and go back to her father's, but that she could not do so, because he would not let her go, and that if he (the officer) would keep Wade off her, until she could get away, she would leave him and go to her father's. She admitted that she had slept in the bed with her codefendant, and said she knew the officer had a warrant for them for living in adultery. She showed him a bleeding cancer on her breast, and told him that Wade had come home drunk, and beat her nearly to death, and stamped her in the breast.

The Court instructed the jury that, if they could not come to any other reasonable conclusion, from the facts and circumstances in evidence, than that the defendants were guilty, they would be justified in so finding; but that, if they could just as reasonably conclude that they were innocent as that they were guilty, they would not be warranted in convicting them; that they were entitled to the benefit of every reasonable doubt; that the admission of Meta could not be considered as evidence against B. G. Wade; and that they must acquit or convict both,—that, under the indictment, they could not acquit one and convict the other.

It appears clearly that there was no competent evidence to support the conviction of B. G. Wade. Meta's admission cannot be taken against him. The other facts and circumstances are not inconsistent with his innocence. In

1 other words, all of them may be true, and still he may be innocent. Therefore, they do not come up to the standard required by the law to warrant a conviction, which is that they must point so conclusively to guilt as to exclude every other reasonable hypothesis. Therefore, the Court erred in refusing to set aside the verdict.

The Court erred also in charging that, under the indictment, one of the defendants could not be acquitted and the other convicted. If that ruling was based upon the reason-

ing that because the indictment charged the defendants jointly, only a joint verdict could be found, it was erroneous; because, while the indictment was joint in form, in legal effect, it was joint and several.

Nor does the nature of the offense forbid a severance either in the trial of the parties charged, or in the verdict, when they are jointly tried. While it is true that it takes two to commit the crime, as it also does the crime of adultery, so far as the physical act is concerned, it does not necessarily follow that both engage in it with criminal intent. One may be insane, or may participate in the act on account of force, fear or fraud. In such a case, the law would

neither allow the guilty party to escape nor would it punish the innocent one. If B. G. Wade compelled Meta to submit to him through force or fear, she should be pitied and protected rather than condemned and punished. Again, it may happen on the trial of such a charge that, though both the defendants may be guilty, there may be no evidence at all against one, while there may be ample evidence by admission or confession against the other. This question was involved in *State v. Carroll*, 30 S. C. 90, 8 S. E. 433, where it was decided contrary to the instructions given in this case. See, also, *State v. Cutshell*, 109 N. C. 764, 26 Am. St. Rep. 599.

The other grounds are overruled.

Reversed.

8642

STATE v. STONE.

1. **INDICTMENT—FALSE PRETENSE.**—An indictment alleging that the defendant represented the horse he was trading to prosecutor to be sound in every respect should not be quashed on the ground that this allegation does not state a fact but a mere opinion. When the fact of the unsoundness of a horse is certain and the party stating it to be sound knows of the unsoundness and makes the statement with intent to cheat and defraud, it is a false representation.

MR. JUSTICE WATTS *dissents*.

State v. Delyou, 1 Bay 353, distinguished from this case. Is it overruled?

2. **FALSE PRETENSE.**—The evidence in this case sustains the verdict in that it is susceptible of the inference that the defendant in swapping horses with the prosecutor represented his horse to be sound, when he knew it was nearly blind, with intent to cheat and defraud.

Before MEMMINGER, J., Laurens, Fall term, 1912. Affirmed.

Indictment against Frank Stone. Defendant appeals.

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Messrs. Richey & Richey, for appellant, cite: 2 Bishop 255; 84 N. C. 751; 1 Bay 353; 77 S. C. 289.

Solicitor R. A. Cooper, contra.

September 1, 1913. The opinion of the Court was delivered by

MR. CHIEF JUSTICE GARY. The defendant was tried before a jury, and convicted of obtaining goods under false pretenses.

The indictment charged him with falsely pretending, that a certain bay horse was sound in every respect, which pretense he then and there knew to be false, whereby he obtained from Lander H. Willis one roan horse, the property of the said Lander H. Willis, of the value of one hundred and fifty dollars, with intent to cheat and defraud the said Lander H. Willis.

The first question that will be considered is, whether his Honor, the presiding Judge, erred, in refusing the motion to quash the indictment, on the ground that it did not state facts, sufficient to constitute a crime.

Section 220 of the Criminal Code (1912) provides, that "any person who shall, by any false pretense or representation * * * obtain from any other person any money, chattel * * * or other property * * * with intent to cheat and defraud any person of the same, shall be guilty of a misdemeanor." * * *

The allegation in the indictment, that the defendant represented, that the bay horse was sound in every respect, was not only the statement of a fact, and not of an opinion, but of a material fact, sufficient to render him liable for damages, in a civil action, if the statement was untrue.

The indictment charged that the defendant made this representation, knowing it to be false, with intent to cheat and

defraud the prosecutor, and thereby obtained from him one roan horse, of the value therein alleged.

The case of the *State v. Hicks*, 77 S. C. 289, 57 S. E. 842, shows that the motion to quash the indictment was properly refused. In construing the statute, the Court in that case, said: "It is perfectly manifest from the express terms of the statute, that an intent to cheat and defraud, is an essential element of the statutory crime, and it is elementary that every essential element of the crime must be alleged and proven. This principle was well understood by the prosecuting officer, for the indictment not only alleges that the pretenses were known to be false, but that the defendant thereby intended to cheat and defraud."

Turning to the appellant's authorities we find, that he quotes the following language from Bishop on Criminal Law, vol. 2, section 454 (7th Ed.), under the head of false pretenses:

"If we look to the reason of the law, and especially to its words, we shall see that its aim is to prevent cheating, and the specific cheat denounced, is the one affected by a false pretense. Now, a mere opinion is not false pretense; but any statement of a present or past fact is, if false. When two men are negotiating a bargain, they may express opinions about their wares to any extent they will, answering, if they lie about the opinions, only to God, and to the civil department of the law of the country. But when the thing concerns fact, as distinguished from opinion, his words in reason amount to a false pretense."

The words of the indictment constitute the false statement of an existing fact, at the time of the exchange of horses. While there are many cases, as to the soundness of a horse, in which there can be no certain knowledge, still there are also numerous cases in which the fact of unsoundness, may be as certain as in any other instance. When the fact of unsoundness is certain, and the party making a statement in regard to it has knowledge of such fact, and nevertheless

makes a false representation, with intent to cheat and defraud, it would be against public policy, to allow him to escape punishment under the criminal law.

The language hereinbefore quoted from Bishop on Criminal Law, sustains our conclusion as to the sufficiency of the indictment.

The appellant's attorneys also rely upon the case of the *State v. Delyon*, 1 Bay 353. The report of that case is very short and is as follows:

"The defendant in this case, was indicted under the swindling act, for selling a blind horse as and for a sound horse, excepting a blemish in one eye, when the defendant had been told he was a blind horse, before the sale.

"The Attorney General contended, that this was an act of swindling under the late law for preventing such deceitful practices.

"The Court (present, Waties, J., and Bay, J.), after hearing counsel in reply, were of the opinion, that this was not such a fraud as was indictable, either at common law or under the act of assembly. That it had the appearance of a breach of contract, or rather a concealment of a blemish (if the defendant knew it) for which he was answerable in damages, in a civil suit. That to encourage a prosecution of this kind, would have a tendency to bring almost every civil injury, into the jurisdiction of the Court of Sessions, which might be extremely injurious in its consequences to the community."

There are material differences in the two cases. In the first place, it does not appear that the defendant in the *Delyon* case, knew that the horse was unsound, and in the second place, even if the defendant knew of the defect, it was regarded as rather a concealment of a blemish, which is passive or negative, and not a false pretense, knowingly made with intent to cheat and defraud, which is active and positive in its nature.

But, be that as it may, if that decision must be construed as holding, that a false representation of the soundness of a horse, made with knowledge of the fact, that the horse was unsound, with intent to cheat and defraud, then it will not be longer regarded as authority for that proposition; such a doctrine would tend to encourage fraud and swindling, and is against the canons of morality.

The next question for consideration is, whether
2 there was error in refusal to direct a verdict, on the ground that there was no testimony tending to prove, that the defendant made any false representation, or that he had any intention to cheat and defraud.

Lander H. Willis, the prosecutor, testified in substance, as follows: "The defendant and one W. N. Myers came to Gray Court in a buggy, driving a bay mare and leading a roan mare; the bay mare belonged to the defendant, and the roan mare belonged to W. N. Myers; Willis' roan horse matched Myers' roan mare, and the defendant wanted the pair for a prospective buyer. In the afternoon, the defendant offered to trade his bay mare, for prosecutor's roan horse, and asked \$25 to boot. The defendant hitched his mare and Myers' mare to prosecutor's buggy, for him to see the mare work, and after driving around awhile, the prosecutor offered to trade even, but no trade was then made; thereafter the defendant offered to trade for \$10 to boot; prosecutor would not agree to give him ten (\$10) dollars, but said he would stick to his offer to trade even; the defendant said: 'Well, I will just make you trade anyway.' Prosecutor said, 'Now, remember you guarantee the horse to be sound, straight and work anywhere.' Defendant said, 'Yes;' prosecutor then turned to Mr. Owings and Mr. Stevens and said, 'I call you all as witnesses to that;' that the defendant said, 'Now, I have only had the horse ten days. I will guarantee it, as far as I know;' the prosecutor then told the defendant, 'If he had had the horse ten days. he had had it long enough to know, whether it was sound or

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not.' Defendant then said to the prosecutor, 'Well, don't you want to try it?' prosecutor then said, 'Well, we will have to go over into the field to change, we can drive it over there, and I can let the negro plough it, to see how it ploughs.' The prosecutor and defendant went to the field, and the negro ploughed the mare, she ploughed all right, and the trade was made. The next morning, the prosecutor discovered, that the mare was blind in one eye, and could not see much out of the other, and wrote the defendant that he had put a blind horse off on the prosecutor. Not hearing from the defendant, the prosecutor swore out a warrant for the defendant."

Arthur Stevens, a witness for the State, testified in substance as follows: "That he and the prosecutor were in the store playing checkers; that defendant came in and said something about a horse swap; prosecutor said he would stick to what he had said; defendant said something about taking less; prosecutor said he would not do anything more than what he had said; defendant said, 'Well, I will just consider it a swap.' Prosecutor said, 'You have to guarantee the horse to be sound and all right, in every respect;' defendant said, 'He would so far as he knew.' Prosecutor turned to Mr. Owens and myself and called us as witnesses to it. Defendant said 'he would guarantee it so far as he knew;' and that is about all I heard of it. Defendant said he had only had the horse about ten days."

The agreement on the part of the defendant, that he would guarantee the horse to be sound, as far as he knew, was sufficient to render him liable in a civil action, whether the facts were such as to make him amenable to the criminal law or not. In order, however, to constitute the offense of obtaining goods under false pretenses, there must be, not only a false pretense or misrepresentation, but it must be made to cheat and defraud. The agreement to guarantee the soundness of the horse, so far as the defendant knew, when considered in connection with the other testimony, was suscep-

tible of the inference, that he intended his words as a representation, that if the horse was unsound he did not know it. Therefore, his knowledge of the unsoundness of the horse, was a material fact in the case. In the synopsis of the defendant's testimony, the following appears: "Defendant knew that the mare had defective eyes, knew her eyes were weak, did not know that one eye was entirely gone, did not know that the mare would likely go blind." In the synopsis of G. H. Moore's testimony we find the following: "While witness was examining defendant's horse, he, the witness, struck at the horse's eye, to see if it was blind. Defendant told witness not to do that, because Mrs. Willis was out there, and further said, that witness would have the horse blind, in both eyes, something like that in a joking way; witness examined the horse's eyes, and one looked like it was blind, the other eye looked fairly well." Pearly Moore, a witness for the defendant, testified in substance as follows: "Witness knows Frank Stone; saw him at Gray Court the day he traded horses with Lander H. Willis; saw defendant's blaze-face mare; noticed her eyes; one eye looked like it was out, the other eye looked like it might be all right; a person of ordinary intelligence could see, that there was something wrong with one of the mare's eyes."

It seems that the defendant was a horse-trader and that the prosecutor, Willis, rather relied upon the defendant's representation, than upon his own judgment as to the soundness of the mare.

The foregoing testimony amply sustains the verdict of the jury.

Judgment affirmed.

MR. JUSTICE WATTS *dissenting*. I dissent from the opinion of the Chief Justice, herein, and think the motion to quash the indictment should have been granted, as it did not state any criminal offense. The allegation that the defendant represented that the bay horse was sound could not be

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any more than in the opinion of the party making the statement he was. If he made a false statement knowing that he was, it might be sufficient to render him liable for damages in a civil action. Parties trading horses are allowed latitude in expressing their opinion of their horses, and trade generally with intent each to get the better of the other, and under the evidence in the case the trial Judge should have directed a verdict of acquittal, as the evidence of prosecutor, himself, showed that the defect in the horse, complained of, was patent, not latent, and by the exercise of the slightest care, by examining and using his eyes, he could have ascertained that the horse's eyes were defective, and under the evidence and the case of *State v. Delyon*, 1 Bay 353, quoted by the Chief Justice, the motion of defendant to direct a verdict should have been granted. That the State has succeeded in convicting the defendant on testimony, which, in my opinion, it is doubtful if the prosecutor could win in a civil suit for damages against defendant where he could recover if he make out his case, by a preponderance of the evidence only. For these reasons I dissent.

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GOSSETT v. WESTERN UNION TEL. CO.

TELEGRAPH COMPANIES.—CHARGE as to duty of telegraph company to receive and deliver messages and to use reasonable care and diligence to have them delivered notwithstanding trouble with its operators, and that the message was received out of office hours, is free from error.

Before SHIPP, J., February term, Anderson, 1913. Affirmed.

Action by Alice and W. G. Gossett against Western Union Telegraph Company. Defendant appeals. So much of the charge as is questioned is:

"It is alleged that the charges claimed by the company were paid on this telegram and the telegram was received for prompt transmission; that the telegram was not delivered until on November the first, and too late to enable the plaintiff to come to Anderson to attend the funeral of T. C. Abbott, who is alleged to be the father of the plaintiff in the case, Mrs. Alice Gossett. And it is alleged that they negligently, wilfully and wantonly failed to deliver the telegram, to transmit and deliver, and that by reason of their failure to deliver the telegram, their negligence in failing to deliver the telegram, that the plaintiff was prevented from attending the funeral of her father and was deprived of the consolation of being present at the funeral, and she claims damages in the sum of nineteen hundred dollars.

"Now, the defendant denies the allegations of the complaint for a first defense, and there is another defense to the case. They say that the telegram was received subject to delay; that the office at Calhoun Falls was open for business between eight in the morning and six o'clock in the afternoon, and that the plaintiff was informed of that fact, and that the telegram was received subject to delay. Another defense is that the wires were out of condition, out of order, crossed, and that they were unable to transmit the message on account of the trouble with the wires, and that the trouble in the wires was caused by an agency over which the company had no control, to wit: the natural element. And another defense is that the plaintiff was negligent in not using the means at hand to secure a postponement of the funeral, and, if she was injured, it was caused by her contributory negligence.

"Now, on the first defense, which is a general denial, it makes it incumbent on the plaintiff to prove the allegations of her complaint by the preponderance or greater weight of the testimony. Now, if the plaintiff has satisfied you by the greater weight of the testimony that the telegram set out in the complaint was delivered to the defendant company at

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Anderson for transmission for her benefit and the charges were paid, why then I charge you that it is the duty of the telegraph company to receive the message and to use proper diligence and proper care, due care, in transmitting and delivering the message in question. The telegraph company is not an insurer of telegrams, the telegraph company is not required under the law to absolutely insure the delivery and transmission of messages, but it is bound to use a reasonable diligence and dispatch, that care which a person of ordinary prudence and care would be expected to exercise under the same circumstances. And if the company failed to use that diligence and dispatch, reasonable diligence and dispatch, in transmitting and delivering the telegram in question, then the company would be liable for any damages that the plaintiff has sustained that she proves to you.

"Now, are you satisfied that the message was delivered? I believe there is no dispute about that.

"Now, if the plaintiff proves that the message was delivered to the company for transmission, then the question for you is, did the company transmit it with reasonable diligence and dispatch? If you come to the conclusion that it did not, then the burden would shift on the defendant to explain to your satisfaction the excuse it has in some way, some legal way, for not transmitting and promptly delivering the message.

"Now, I charge you that where a telegraph company fails to transmit or deliver a telegraph message by reason of some accident or agency over which it had no control, over which no human foresight could have prevented—in other words, if it fails to do it by some act of God, and if it is the sole cause of the failure to transmit and deliver, why that would excuse it. Because a telegraph company is excused if it is prevented by some act of God, but that must be the sole cause of the failure to transmit and deliver.

"Now, it is incumbent upon the telegraph company that did not deliver the message to show you, to make out its

defense, that it was prevented by the act of God, it would have to show you that and show you that by the preponderance of the testimony.

"I charge you that a telegraph company has a right, that it had a right to have reasonable office hours; that is, according to the circumstances that surround it. In other words, the office hours would be limited there according to the public requirements. In smaller towns you would have a right to take that into consideration. They have a right to have reasonable office hours, and the telegraph company is not bound to receive and deliver messages out of its reasonable office hours; yet if the company receives during those hours, it is their business to deliver with reasonable dispatch. So, you see, after all, it is a question of fact in this case for you to settle.

"Now, was T. C. Abbott the father of the plaintiff in the case, did he die, and was she prevented from attending his funeral? If she was, why the law says that all telegraph companies are liable in damages for mental anguish, whether there is any bodily injury or not, occasioned by the negligence of the company in failing to transmit, negligence in failing to receive, transmit and deliver telegraph messages. And when a telegram shows on its face that it relates to sickness or death, the real party for whose benefit the telegram was sent and who suffered mental anguish by reason of the negligence and wilfulness of the telegraph company may recover damages, without proof that the company knew the relationship of the parties.

"So I charge you now if the plaintiff in the case was prevented from attending the funeral of her father by reason of negligence of the telegraph company, then the defendant would be liable to her for any mental anguish that she suffered by reason of being prevented from attending the funeral of her father. When you come to consider damages, if you find that she is entitled to recover, why there is no way in which I can tell you how to measure that, because the

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statute here says give her such damages— I will read you the section. (Reading same.) In all cases under this section the jury may award such damages as they conclude resulted from such negligence, wilfulness and recklessness of said telegraph company.

“Now, I charge you that you leave out in considering this case all these allegations about wilfulness and wantonness, because the plaintiff has withdrawn any claim for what we call wilfulness and wantonness. I had better explain that to you.

“By the word negligence we mean the failure to observe due care. It is the failure to do that which a person of ordinary prudence would do under the same circumstances, or it is the doing of something that a person of ordinary prudence would not have done under the same circumstances. That is what we mean by negligence. It is the failure to observe proper care under the circumstances. Now, where a person simply fails to observe due care inadvertently, fails to do his duty, why you call that negligence, where he just simply fails, inadvertently fails, to do his duty; but where a person adverts to his duty and thinks about his duty and knows about his duty, and then consciously violates his duty, we call that wilful. But so far as wilfulness is concerned now, it is withdrawn from the case. But the statute says if you conclude that the plaintiff is entitled to damages, it leaves it to the jury to decide, and the law does not lay down any way by which you are to measure it except by your own good judgment. In no case could you give the plaintiff any greater amount than she claims in her complaint, which is nineteen hundred dollars. You can give her any less sum than that that you conclude that she is entitled to, if you conclude that she is entitled to anything. * * *”

Messrs. Geo. H. Fearons, John Gary Evans and Bonham, Watkins & Allen, for appellant. Messrs. John Gary Evans

and *Bonham, Watkins & Allen* cite: *Measure of damages*: 83 S. C. 8. *Proximate cause*: 70 S. C. 418; 90 S. C. 132; 84 S. C. 67; 93 S. C. 119, 173, 176.

Mr. A. H. Dagnall, contra, cites: *Excuse for not delivering*: 80 S. C. 207; 72 S. C. 350. *Measure of damages*: 73 S. C. 524.

September 8, 1913. The opinion of the Court was delivered by

MR. JUSTICE WATTS. This was an action by plaintiffs against the defendant for mental anguish, caused by failure to deliver promptly to plaintiff's husband a telegram, announcing the death of her father. The action was both for actual and punitive damages, the cause was heard by his Honor, Judge Shipp, and a jury, at the February term of the Court, 1913, and at the close of the evidence the plaintiffs withdrew from the jury the question of punitive damages. The jury found for the plaintiffs \$1,500, and the Judge granted a new trial, unless the plaintiffs would remit \$500 of this amount, which they did. After entry of judgment, the defendant appealed and asks reversal of the same by nine exceptions, eight of which impute error to his Honor in his charge to the jury. The Judge's charge, as a whole, is free from error, and if the appellant desired more specific instructions it should have presented requests to charge. His Honor read to the jury what is known as "the Mental Anguish Act" (section 3330, Code of Laws 1912), and his charge is sustained by the cases of *Mercer v. Southern Railway Co.*, 66 S. C. 247, 44 S. E. 750; *Hughes v. Telegraph Co.*, 72 S. C. 517, 52 S. E. 107; *Tinsley v. Telegraph Co.*, 72 S. C. 350, 51 S. E. 913; *Fail v. Telegraph Co.*, 80 S. C. 207, 60 S. E. 697; *Bennett v. Street Railway Co.*, 92 S. C. 75; *Roberts v. Telegraph Co.*, 73 S. C. 524, 53 S. E. 985. These exceptions are overruled.

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The ninth exception complains of error on the part of his Honor in not granting a new trial. This exception cannot be sustained, as there was sufficient evidence to sustain the verdict.

Judgment affirmed.

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STATE EX REL. RAY v. BLEASE, GOVERNOR.

1. JURISDICTION.—THE SINKING FUND COMMISSION is not subject to the control of the Court in matters within its discretion.
2. CONSTITUTIONAL LAW.—The act of 1912, 27 Stat. 738, does not violate section 17 of article III of the Constitution in that the provision in the body of the act is that bonds and stocks may be issued to retire those in circulation while the title expresses the subject of providing for the exercise of the State's option in calling in certain bonds and stocks, as the provision in the body is germane to the subject expressed in the title.
3. TWO OFFICES.—Membership in the sinking fund commission is not an office. The law creating the commission only devolves on certain officers specific duties.
4. CONSTITUTIONAL LAW—STATUTES.—Where there are two possible constructions of an act, one of them making its provisions consistent and the other inconsistent, the former should be adopted. Applying this rule to the act of 1912 the sinking fund commission under it has no authority to redeem Green Consols. Also if the act were so construed it would violate article III, section 17, of the Constitution.
5. *IBID.*—*IBID.*—Under the act of 1912, 27 Stat. 738, the commission has authority to refund Redemption Brown Consols. issued under the act of 1893, as that act was only amendatory to the act of 1892 on the same subject.
6. *IBID.*—BOND DEBT OF STATE.—The following principles apply to the state in refunding its outstanding bonded debt:
 - (1) The refunding of a valid existing debt does not increase the debt of the State, and needs not the sanction of the qualified electors which is required by section 11 of article X of the Constitution before the public debt can be increased.

- (2) The liability of the State upon negotiable paper, issued by competent authority, is the same as that which attaches to private individuals under like circumstances.
- (8) Holders of such paper in the absence of allegation to the contrary are presumed to be innocent purchasers for value before maturity and without notice of any objection to which it may be liable.
- (4) When authority to issue such paper exists neither irregularities nor frauds on the part of the officers or agents of the State who are entrusted with the exercise of such authority will affect it in the hands of such holders.
- (5) The State is estopped to deny recitals on the face of such paper in the hands of such holders.
7. *IBID.—IBID.—VALIDATION.*—The title of the joint resolution approved March 22, 1878, is sufficiently comprehensive to embrace in the body of the resolution the validation of the issuance of Green Consols by former officers of the State after their terms of office had expired. The State has the authority to authorize private individuals to issue bonds and to validate any irregularities in their issuance.
8. *IBID.—IBID.*—The title of the act of 1878 is broad enough to include the refunding of obligations of the State issued after January 1, 1866.
9. *LIMITATION OF ACTIONS.*—The act of 1896 limiting the time within which coupon bonds may be consolidated or refunded does not destroy the validity of such obligations, but only prevents the State Treasurer from refunding them after that time and the legislature by thereafter providing for refunding such obligations does not thereby increase the bonded debt of the State.
10. *BOND DEBT OF STATE.*—"Date of issue" as used in the act of 1892 means the date which stocks and bonds bear, and does not refer to the date on which they were actually issued.
11. *IBID.*—Under the provisions of the act of 1892 the sinking fund commission should now (at the expiration of 20 years from the date of the bonds then issued) cancel the bonds and stocks bought by it.

Petition by W. W. Ray *ex rel.* the State for injunction against the Sinking Fund Commission.

Messrs. Weston & Aycock, for petitioner, cite: *Resolution of Sinking Fund Commission passed by less than a quorum is not valid*: Sedg. Con. L. 387; 11 S. C. 343; 28

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S. C. 521; 52 S. C. 60; 86 S. W. 319; 21 Barb. 500; 22 Barb. 137, 400; 46 N. Y. 375; 49 Pac. 89; 31 Miss. 525; 9 Ark. 300; Mech. Pub. Off., secs. 572-3; 52 N. Y. 478; 74 S. E. 506; Harp. 139; 144 U. S. 1; 4 Tenn. Rep. 810; 6 *Ibid.* 268; 4 East. 17; 1 B. & C. 492, 609; 9 B. & C. 851; Cushing L. & P. of Leg. Ass., sec. 261; 1 Pearson 118; 12 Fla. 653; 5 Davis Abridg. 150; 4 Abb. N. Cas. 51; 4 So. 763; 59 Pac. 563. *Chairman of the Ways and Means Committee of the House is not a member after election of his successor:* 28 Cal. 44; 122 N. W. 462; 147 N. Y. 426; 46 Fed. 728; 24 Am. St. 276. *Act of 1912 is unconstitutional because subject is not expressed in the title:* 75 S. E. 392. *Bonds executed and issued after terms of officers who were authorized to issue them are invalid:* 131 U. S. 162; Dillon, sec. 888; 138 Fed. 313. *Where bonds of a single series are issued beyond a constitutional limit, those first delivered within the limit are valid:* 117 U. S. 657; 22 Am. R. 215; Dillon, section 203. *Consols stolen are not binding obligations of the State:* 78 S. C. 269. *Meaning of "date of issue."* 66 S. E. 681.

Mr. J. Fraser Lyon, for certain respondents, cites: Majority of existing members of commission may act for body: 33 Mich. 321; 68 N. W. 802; 122 Wis. 526; 3 Strob. 486; 28 S. C. 521; Dillon, secs. 502, 520; 55 N. W. 547; 95 U. S. 360; 86 Ga. 132; 4 At. 116; 1 Pac. 356; 1 Wis. 597; 1 McC. 52; 36 L. R. A. 746; 23 Ency. 368; 26 Conn. 192; 37 S. W. 393; 23 Barb. 176; 21 Pick. 75; 85 S. C. 156; 71 S. E. 506; Harp. 139; 17 Abb. Pr. R. 201; 56 N. E. 14; 71 Pac. 365; 59 At. 961. *Chairman of Ways and Means Committee could act until his successor qualified:* 131 N. W. 861; Dillon, sec. 412; 4 At. 282. *He was defacto officer:* 35 S. C. 192; 7 Rich. L. 21; 27 S. C. 436; Dillon 518; Constantinean on De Facto, secs. 311-12; 147 N. Y. 426; 86 S. C. 503. *Subject of act of 1912 is within title:* 74 S. C. 448. *Two office doctrine does not apply to members of the*

commission: 52 S. W. 480; 9 S. W. 120; 81 N. W. 377; 6 W. Va. 562; 47 S. C. 75; 52 S. C. 520. *The act of 1912 provides for refunding Green Consols*: Suth. Stat. Con., secs. 383, 349; 48 S. C. 149. *And consols stolen*: 78 S. C. 269. *Legislature may validate irregular issue of bonds*: 4 S. C. 430; 12 S. C. 200; 10 Rich. L. 491; 75 S. E. 503. *Mere irregularity in issue of bonds do not affect their validity*: 12 S. C. 200; 39 S. C. 288; 78 S. C. 269; Dillon, sec. 903; Machen Law of Corporations, sec. 1743; 41 N. E. 7; 173 Mass. 275. *Meaning of "date of issue."* 25 Pac. 1014.

September 8, 1913. The opinion of the Court was delivered by

MR. JUSTICE HYDRICK. At the session of 1912, the legislature passed an act entitled, "An act to provide for the exercise by the State of its option to call in and pay the whole or any part of the Brown Bonds and Stocks, issued under an act entitled 'An act to provide for the redemption of that portion of the State debt known as the Brown Consol Bonds and Stocks, by the issue of other bonds and stocks,' approved December 22, A. D. 1892." 27 Stat. 738. The act provides that the Sinking Fund Commission, which is composed of the Governor, the State Treasurer, the Comptroller General, the Attorney General, the chairman of the Committee on Finance of the Senate and the chairman of the Committee on Ways and Means of the House of Representatives, shall have authority to exercise the option reserved to the State in the refunding act of 1892 (24 Stat. 24) to call in and pay, at the expiration of twenty years from the date of issue thereof, the whole or any part of the bonds and stocks issued thereunder, dated January 1, 1893, and known as Redemption Brown Consols; and, for that purpose, that the commission shall be authorized to issue and sell 4% bonds and stocks, not exceeding the aggregate outstanding amount of the bonds and stocks that have been or

may be issued under said act of 1892, and certain previous refunding acts which are specifically mentioned.

During the year 1912, the commission passed several resolutions and took some steps preliminary to carrying out the provisions of the act. Hon. W. L. Mauldin, who was chairman of the Committee on Finance of the Senate, died before either of the meetings of the commission herein mentioned was held, and thereby a vacancy in the commission was created. On October 30, 1912, the commission passed a resolution that its clerk ascertain what amount of the sinking fund would be available on January 2, 1913, for retiring the Brown Consols, and that, when the amount was ascertained, "the necessary steps be taken for calling in the bonds to collect the amount thereof to be paid off and retired." That resolution was adopted at a meeting of the commission attended by four of its members, and its validity has not been questioned. On December 2, 1912, in pursuance of that resolution, the State Treasurer, who is the secretary and treasurer of the commission, published over his signature, as State Treasurer and treasurer of the commission, in a financial paper in New York and in two daily papers in this State, a notice to the holders of Redemption Brown Bonds, issued under the act of 1892, and numbered from 3781 to 4319, both included, to present the same to him, on January 1, 1913, for payment, and that interest accruing thereon after said date would not be paid.

On December 23, 1912, pursuant to a call of the chairman of the commission, due notice of which was given to each member thereof, the Attorney General, the Comptroller General, the State Treasurer, and Hon. L. J. Browning, who had been, and claimed that he was then, chairman of the Committee on Ways and Means of the House of Representatives, met together as the Sinking Fund Commission, and, by unanimous vote, passed several resolutions relative to the refunding of the State debt, under the act of 1912, the substance of which was as follows: 1. Ratifying the publica-

tion of the notice by the treasurer above mentioned. 2. Authorizing the Comptroller General to receive proposals, pursuant to published advertisement or otherwise, for the purpose of the issue of bonds and stocks which the commission was authorized by the act of 1912 to issue. 3. That the Comptroller General report to the commission the proposals received, and that the commission sell the bonds and stocks at the best price obtainable, not less than par flat. 4. That after the completion of said sale, the treasurer call all Redemption Brown Bonds (not already called) for redemption on July 1, 1913, but if said sale should not have been completed by that date, said call should abide the further order of the commission. 5. That the new issue of bonds and stocks should be dated and bear interest from January 1, 1913, specifying the rate of interest, times and places of payment thereof, and the date of maturity of the bonds and stocks, and the privilege of redemption, according to the terms of the act.

The validity of these resolutions is questioned by the petitioner and by some of the respondents, on the ground that, when they were adopted, Mr. Browning's term of office as a member of the House of Representatives had expired, and he was not, therefore, a member of the commission, and, without him, there were only three members present, and, as four members were necessary to constitute a quorum, no business could have been lawfully transacted at said meeting. Section 10 of article II of the Constitution provides that the terms of office of representatives chosen at a general election shall begin the Monday following such election. Mr. Browning's successor was elected at the general election held on November 5, 1912; therefore, it is contended that he was not a lawful member of the commission on December 23, 1912, the date on which the resolutions in question were passed.

On January 6, 1913, this action for injunction was commenced against the former members of the commission to

test the constitutionality of the act of 1912, and the authority of the commission thereunder to pay or refund certain outstanding bonds and stocks, which are particularly mentioned in the petition, and the validity of the resolution of December 23, 1912, in order that all questions as to the validity of the bonds and stocks which may be issued by the commission may be finally settled and determined.

After the General Assembly had convened, pursuant to the Constitution, and after the State officers who had been elected at the general election, on November 5, 1912, had been inaugurated and qualified, and a chairman of the Committee on Finance of the Senate and a chairman of the Committee on Ways and Means of the House of Representatives had been appointed, an order was passed making these new officials parties respondent herein.

After returns had been filed on behalf of all the respondents, the case was referred to Halcott P. Green, Esq., as special referee, to take and report the testimony, together with his findings thereupon.

The referee finds that the allegations or suggestions contained in the return of his Excellency, the Governor, are unsustained, in so far as it is therein alleged or suggested that there was any irregularity or fraud in connection with the refunding of bonds under the act of 1892, or any unfairness, impropriety, illegality or collusion in connection with any understanding or agreement on the part of the former members of the commission, or any of them, with any person, firm or corporation relative to the purchase or sale of the bonds and stocks to be issued under the act of 1912, or with reference to the bringing of this action. As the matters referred to do not affect the validity of the bonds and stocks to be issued, and as no exception has been taken to the findings of the referee, we deem it unnecessary to prolong this opinion by a more detailed statement or consideration of them.

It appears that the action of the State Treasurer and treasurer of the Sinking Fund Commission in advertising the call for the Redemption Brown Bonds hereinbefore mentioned, to be presented to him, on January 1, 1913, for payment, was based upon and authorized by the resolution of the commission passed at its meeting on October 30, 1912, at which there was a quorum of members whose title to office at that time is unquestioned, and that the resolution of December 23, 1912, so far as that call is concerned, was only an attempt to ratify what he had done. As his action was based upon unquestioned and unquestionable authority, it needed no ratification, which is necessary only when it is sought to validate an act done without authority.

As to the other resolutions of that date, the substance of which has been hereinbefore stated, it need only be said that it appears from their nature that they involve matters of

detail which are either fixed by the terms of the act,
1 or such as are within the discretion and judgment of the commission in carrying out the provisions of the act, and are, therefore, still subject to its orders; but as to matters within their discretion, the commission is not subject to the control of the Court. Furthermore, it appears that the commission, as now constituted, refused to revoke these resolutions, and thereby impliedly ratified them. It follows, therefore, that it is unnecessary to decide whether the resolutions passed at the meeting of December 23, 1912, are valid or not; hence, any decision or discussion of the questions involved in that issue would be mere *obiter dictum*.

The validity of the act is questioned under the allegation that it violated section 17 of article III of the Constitution, which provides that every act shall relate to but one subject, which shall be expressed in its title. The specific

2 objection is that the body of the act provides for the issuance of the bonds and stocks, while the title expresses only the subject of providing for the exercise of the State's option to call in and pay certain bonds and stocks.

It is argued that the subject of calling in and paying certain bonds and stocks is not broad enough to cover the issuance of refunding bonds and stocks. But the title is broader than the argument assumes. It expresses the subject of making provision for the exercise of the State's option to call in and pay certain bonds and stocks, and whatever the legislature deemed necessary or proper to make provision to accomplish that purpose is germane to the subject expressed in the title. The issuance of bonds and stocks is the usual method of accomplishing such a purpose, and in this respect the act does not violate the Constitution. *State v. O'Day*, 74 S. C. 448, 54 S. E. 607, and cases cited.

It is next alleged that the act violates section 2 of article II of the Constitution, which provides that no person shall hold two offices of honor or profit at the same time. The

specific point is that the Sinking Fund Commission is

3 illegally constituted in that it is composed of public officers. The answer to this objection is that membership in the commission is not an office. It merely involves the discharge of duties imposed by law upon the various officers who compose the commission,—duties which are, therefore, merely incidental to their respective offices. *State v. Porterfield*, 47 S. C. 75, 25 S. E. 39; *State v. Green*, 52 S. C. 520, 30 S. E. 683.

Without stating in detail the legislation under which the obligations of the State have been funded, consolidated and refunded from time to time, it will be sufficient, for the purpose of making clear the objections which we shall

4 next consider, to say that, since the War Between the States, there have been three principal issues of bonds and stocks. The first are called Green Consols. These were issued under the act of 1873 (15 Stat. 518) and subsequent acts amending and extending its provisions. After the greater part of the State debt had been refunded under that act, it was discovered that many of the Green Consols had been issued to redeem bonds and stocks which had been

issued without authority of law, and were, therefore, void. After investigation into the validity of the entire debt of the State, the legislature, in various acts from 1878 to 1880, authorized the issuance of bonds and stocks to take the place of Green Consols found to be valid, and for the refunding of the remaining outstanding valid debt of the State. These bonds were to be of the same kind as Green Consols in every respect material to the present inquiry, except their color. They were colored brown, and are commonly known as Brown Consols. All Green Consols and Brown Consols matured July 1, 1893. In 1892, the legislature passed an act entitled, "An act to provide for the redemption of that part of the State debt known as the Brown Consol Bonds and Stocks by issue of other bonds and stocks." (21 Stat. 24.) The bonds and stock issued under this act are called Redemption Brown Consols. It will be seen from the title of the act, above quoted, that it contemplated the redemption of only the Brown Consols. But, at the date of its passage, there were still outstanding some Green Consols and some other obligations of the State which had not been refunded either in Green Consols or Brown Consols, which were, however, still fundable in Brown Consols; hence, the act authorized an issue of new bonds and stocks sufficient in amount to redeem all the bonds and stocks of the State which had been or might be issued under the act of 1873, and all subsequent acts authorizing the issue of bonds and stocks. Thereafter, by the act of December 22, 1893 (21 Stat. 420), the legislature authorized the State Treasurer to refund in Redemption Brown Consols the valid principal, with interest, to July 1, 1893, of all bonds and stocks then fundable in Brown Consols. Doubtless this act was found to be necessary because of the specific limitation both in the title and in the body of the act of 1892 of the use of the issue of bonds and stocks therein authorized and the proceeds of the sale thereof to the redemption of Brown Consols. There are

still outstanding certain Green Consols which have not been refunded.

The petitioner contends that the act of 1912 does not authorize the refunding of these outstanding Green Consols, for two reasons: 1. Because the body of the act not only does not authorize it, but forbids the refunding of any, except Brown Consols; 2. Because, if the body of the act can be properly construed as authorizing the refunding of Green Consols, it violates the Constitution and is void to that extent, because that subject is not expressed in its title.

This contention must be sustained upon both grounds. While the act is by no means as clear as it should have been upon this subject, yet we think, taking all of its provisions together, and considering them in the light of the other acts upon the same subject, the intention to be gathered from the language used prohibits the funding of any except the Brown Consols, issued under the act of 1892. The only provisions of the act upon this subject are found in sections 6 and 7. Section 6, after authorizing the sale of the issue by the commission, provides that "the proceeds thereof shall be applied to the payment of the said Redemption Bonds and Stocks, issued under the act of 1892, and the consolidated bonds and certificates of stock, commonly called Brown Consols, and to no other purpose." Section 7, after providing for the sale and registry of the bonds and stocks, says: "And the proceeds of such sales shall be kept as a separate fund to be used exclusively for the final redemption of such Brown Bonds and Stocks, issued under the act of 1892, and said consolidated bonds and certificates of stock hereinbefore described as shall not be exchanged for the bonds and certificates of stock the issue of which is provided for in this act: *Provided, however,* That the Sinking Fund Commission, if in their judgment it is best to do so, shall have authority to exchange, in whole or in part, the new four per cent. bonds for Brown Consols upon such terms as may best subserve the public welfare." Counsel for the commission admit

that section 6 limits the use of the proceeds of sale to the payment of Redemption Brown Consols, issued under the act of 1892, and to Brown Consols, but they contend that the provision of section 7, above quoted, is inconsistent therewith, and, being last, it should control. But when we construe the provisions of both sections together, in the light of the other parts of the act, as we must, there is no inconsistency. Section 6 refers to two well known classes of Brown Consols, to wit, Redemption Brown Consols, issued under the act of 1892, and Brown Consols, issued under previous acts. Section 7 refers to the same two classes, *first*, "such Brown Bonds and Stocks issued under the act of 1892," and *second*, "said consolidated bonds and certificates of stock hereinbefore described," which can certainly as clearly be referred to the Brown Consols mentioned in section 6 as to any other, and when so referred there is no inconsistency in the terms of the statute. When there are two possible constructions of the provisions of an act, one of which makes them consistent with each other, and the other makes them inconsistent, the former must be adopted.

While the body of the act does authorize the redemption of both Redemption Brown Consols and Brown Consols, the title specifically limits the act to the redemption of bonds and stocks issued under the act of 1892, namely, Redemption Brown Consols. While the Courts construe the provision of the Constitution in question (that an act shall relate to but one subject which shall be expressed in its title) very liberally to the end that legislation shall not thereby be needlessly hampered and embarrassed, still, when the title of an act definitely and specifically limits its subject, as that of the act of 1892 does, to the redemption of a particular and specified issue of bonds, the Court must limit the operation of the act to the subject so expressed in the title. Otherwise, the provision of the Constitution in question would be set at naught. The legislature may have had good reasons for limiting the commission to the redemption of the consols

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issued under the act of 1892. But it is not for us to inquire whether it had any reasons, or whether they were good or bad, or whether the failure to provide for the redemption of all the outstanding obligations of the State is only a *casus omissus*. In either event, we have no power to dispense with the mandate of the Constitution. The commission is, therefore, limited to the redemption of Redemption Brown Consols issued under the act of 1892.

It is argued, however, that Green Consols are, by the act of 1893, fundable in Redemption Brown Consols, and, this being so, the holders thereof could have them so refunded, and then the commission could refund the latter, and that, as the law does not require the doing of useless things, such circuitous proceeding should be unnecessary. On the other hand, the Court can not sanction the doing of that by the commission which is positively forbidden by the legislature. Moreover, the commission can not issue bonds or stocks under the act of 1892. Under that act, bonds and stocks were issued by the treasurer. Whether the treasurer can still issue Redemption Brown Consols, under the act of 1892, to refund Green Consols is a question which we are not called upon to answer.

The next question is whether the commission has authority to refund Redemption Brown Consols, issued under the act of 1893, as consols issued under the act of 1892. As

we have seen above the act of 1893 was clearly
5 intended as an amendment supplementing the act of 1892, whereby its scope was enlarged so as to permit the refunding not only of Brown Consols, but also of all outstanding obligations fundable in Brown Consols. The act specifically requires that the consols issued thereunder shall be of the kind issued under the act of 1892, known as Redemption Brown Consols, and the consols issued under the act of 1893 recite on their face that they were issued under that act. As we shall presently see, the State is estopped to deny that they were so issued.

We proceed next to dispose of the objections to refunding certain bonds and stocks which are made in the following subdivisions of paragraph 20 of the petition.

20. "Certain bonds and stocks about to be refunded under the act of 1912 are not binding obligations of the State, and, therefore, such refunding will be an attempt to increase the indebtedness of the State for extraordinary purposes

6 without an election, contrary to the provisions of section 11 of article X of the State Constitution, for the following reasons (a, b, e and j are hereinafter considered) :

"(c) Brown Consols predicated upon the \$19,279.75 bills of the Bank of the State stolen and outstanding at the time of issuance of such Brown Consols, as stated in paragraph 16, are not binding obligations of the State, nor is any bond or stock whose origin is to be traced to said Brown Consols in so far as it rests thereon, because the issuance of said Brown Consols was an attempt to increase the debt of the State for extraordinary purposes without an election, contrary to article XVI of the State Constitution of 1868.

"(d) The act entitled 'An act to extend the time within which bills of the Bank of the State may be funded, and to provide the manner of funding the same,' approved December 24, 1880, above mentioned in paragraph 17, authorized until July 1, 1881, the presentation of bills of the Bank of the State for examination and exchange for Brown Consols. Section 5 of said act provided as follows: 'That from and after the first day of July, 1881, all action and right of action, claim and demand, whatsoever, upon the obligations of the corporation known as the president and directors of the Bank of the State of South Carolina, and incident to or growing out of said obligations, shall cease and determine, and from thenceforth shall be forever barred.' This act has never been amended or repealed. After July 1, 1881, the end of the period limited by said act, \$36,139.34 of bills were presented, and \$18,069.59 of Brown Consols were

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issued in exchange. The issuance of said \$18,069.59 of Brown Consols upon bills of the Bank of the State presented after the time limited for such presentation by the act of December 24, 1880, was unauthorized, and such Brown Consols are not binding obligations of the State, nor are any bonds or stocks resting upon such Brown Consols binding obligations in so far as they so rest.

“(f) In the months of July and September, 1893, but after July 1, 1893, \$1,029.29 of Brown Consols were issued in exchange for other bonds and stocks as shown by the second schedule appended to paragraph 18 hereof, and immediately thereafter were redeemed by exchange for 4½% Redemption Brown Consols of like amount. As the acts providing for the issuance of Brown Consols directed that they should mature July 1, 1893, and therefore did not authorize the issuance of such Brown Consols after that date, and as the act of 1892 providing for the issuance of 4½% Redemption Brown Consols limited to July 1, 1893, the time within which Brown Consols could be exchanged therefor, said \$1,029.29 of Redemption Brown Consols were issued without authority of law and are not binding obligations of the State. Moreover, the act of 1893 did not authorize the refunding by exchange of Brown Consols surrendered by persons other than the purchasers of the new consols, and said \$1,029.29 of Brown Consols were surrendered by persons other than such purchasers.

“(g) Brown Consols in the aggregate amount of about \$706,203.87 issued prior to July 1, 1893, were surrendered and exchanged for 4½% Redemption Brown Consols after that date, contrary to the above mentioned provisions of the act of 1892, limiting the time for such surrender and exchange, and, therefore, the 4½% consols issued in exchange for such Brown Consols were issued without authority of law.

“(h) A number of 4% Redemption Brown Consols issued under the act of 1889 as amended in 1890, were sur-

rendered after July 1, 1893, and new 4½% Redemption Brown Consols were issued in exchange. Section 15 of the act of 1892 authorized the surrender of 4% bonds and the issuance of such 4½% bonds in exchange therefor 'as provided in this act,' and the limitation of time for surrender and exchange of Brown Consols contained in this act must, therefore, be applicable also to the surrender and exchange of the 4% Redemption Brown Consols. The new 4½% consols issued in exchange for 4% consols surrendered after July 1, 1893, were, therefore, issued without authority of law.

"(i) At some time between the years 1893 and 1902, at least \$14,500 of 4½% Redemption Brown Consol Bonds surrendered and exchanged for stock pursuant to said act of 1892, were not cancelled as required by said act, but were stolen by a clerk in the office of the State Treasurer. Seven thousand dollars of said stolen bonds have, since been surrendered and exchanged for stock as provided in the act of 1892. Although the Supreme Court has held in the case of *Ehrlich v. Jennings, Treasurer*, 78 S. C. 269, 58 S. E. 922, that the State was estopped to deny the validity of one of said bonds which was in the hands of a *bona fide* purchaser, it has not been established that the others have reached the hands of *bona fide* purchasers, and until that fact be established, the issuance of new bonds and stocks predicated upon such other stolen bonds or stock issued in exchange therefor will be unauthorized by law, and contrary to the provisions of section 11 of article X of the State Constitution."

The following principles were established in the Bond Debt Cases, 12 S. C., 200, and the cases of *Robertson v. Tillman*, 39 S. C. 283, 17 S. E. 678, and *Ehrlich v. Jennings*, 78 S. C. 269; 58 S. E. 922.

1. The refunding of a valid existing debt does not increase the debt of the State, and, therefore, needs not the sanction of the qualified electors, which is required by sec-

tion 11 of article X of the Constitution before the public debt can be increased.

2. The liability of the State upon negotiable paper, issued by competent authority, is the same as that which attaches to private individuals under like circumstances.

3. Holders of such paper, in the absence of allegation to the contrary, are presumed to be innocent purchasers thereof for value, before maturity, and without notice of any objection to which it may be liable.

4. When authority to issue such paper exists, neither irregularities nor frauds on the part of the officers or agents of the State who are entrusted with the exercise of such authority, will affect it in the hands of such holders.

5. The State is estopped to deny recitals on the face of such paper in the hands of such holders.

Under the principles above stated, the objections made in each of the foregoing subdivisions must be overruled, because it is not alleged in the petition that any of the holders of the consols which the commission propose to redeem are not innocent purchasers thereof for value, before maturity, and without notice of the defects alleged; nor is it alleged that any of said consols are not rested upon valid debts of the State, or that they were fraudulent or void in their inception. Other reasons might be assigned, but we deem the foregoing sufficient.

The disposition of the remaining subdivisions of paragraph 20 depends somewhat upon other principles besides those above stated.

“(a) Green Consol Bonds and Stocks in the aggregate amount of \$54,600, described by their numbers and denominations in the report of the bond commission, were reported by the bond commission to have been executed and

7 issued after the terms of office of the officials who executed and issued them had expired, as stated in paragraphs 12 and 13, and said consols were therefore not binding obligations of the State. These Green Consols are

referred to in the following extract from section 15 of the 'joint resolution providing a mode of ascertaining the debt of the State and of liquidating and settling the same,' approved March 22, 1878: 'That the bonds and certificates of stock and exchange and transfer certificates of stock mentioned in said report as issued by F. L. Cardozo as State Treasurer, the same being signed by D. H. Chamberlain as Governor, and countersigned by Thomas C. Dunn as Comptroller General, after the terms of these officials had expired, amounting in the whole to \$54,600, be and the same are hereby declared to be in all respects as if the same had been issued before the expiration of the said terms of office of said officials, and the validity thereof shall be determined as hereinbefore provided. * * *' This provision did not operate to validate these Green Consols because such validation is not expressed in the title of said joint resolution, and because such validation would have increased the indebtedness of the State for extraordinary purposes without an election, contrary to article XVI of the State Constitution of 1868. None of said Green Consols, nor any bond or certificate of stock whose origin is to be traced to said Green Consols is a binding obligation of the State in so far as it rests thereon."

Under the decisions of this Court, construing and applying the provision of the Constitution in question the title of the joint resolution referred to in this subdivision is clearly comprehensive enough in the expression of its subject to embrace the validation of the issuance of these consols by the officers named after the expiration of their terms of office. The subject of the resolution was providing a mode of ascertaining the debt of the State. As to these consols, the mode provided as to the irregularity of their issuance, was the declaration, by the legislature itself, that they were, so far as that matter was concerned, a part of the valid debt of the State,—a matter clearly germane to the subject expressed in the title. They were validated only with respect to that irregularity. In all other respects, their

validity was, by the terms of the resolution, subject to the investigation and decision of the court of claims, just as if they had been issued by said officials while in office. There was no requirement of the Constitution that they should be issued by any particular officer or person. Therefore, it was competent for the legislature to provide that they should be issued by private individuals, as the agents of the State; and, of course, it had the power to ratify what it could have authorized in the first instance. *Morton Bliss & Co. v. Comptroller General*, 4 S. C. 430.

It is not alleged that these consols were not rested upon valid debts of the State. If they were, as we have seen, the refunding of them did not increase the debt of the State.

“(b) The act entitled ‘An act to extend the time for funding the unquestionable debt of the State,’ approved December 20, 1878, above mentioned in paragraph 14, authorized the refunding until October 31, 1879, of obligations

8 issued prior to January 1, 1866, and no others. The act entitled ‘An act to continue in force an act to extend the time for funding the unquestionable debt of the State,’ approved December 24, 1879, above mentioned in paragraph 15, authorized the refunding until October 31, 1880, of obligations issued prior to January 1, 1866, and also obligations issued after that date which should be found valid by Special Commissioner Coit. The subject of refunding obligations issued after January 1, 1866, is not expressed in the title of the latter act as required by section 20 of article II of the State Constitution of 1868, and, therefore, no Brown Consols issued for such refunding pursuant to said act nor any bond or certificate whose origin is to be traced to said Brown Consols is a binding obligation of the State in so far as it rests thereon.”

Neither the title of the act of 1878 nor that of 1879 mentions any particular debts of the State, the time for the refunding of which was extended. In both, the unquestionable debt of the State was the subject of the extension,—

without regard to whether it was issued before or after 1866. The subject expressed in the title of the act of 1878 is clearly broad enough to embrace the declaration by the legislature in the body of the act of what the unquestionable debt of the State consisted, which, at the date of that act, was confined to obligations issued prior to January 1, 1866. If, at that time, there had existed a class of obligations issued after January 1, 1866, which were considered unquestionable, it is clear that provision might have been made for refunding them also. If so, it is equally clear that it could have been made thereafter by amendment of the act; and the act of 1879 is, in effect, only an amendment of the act of 1878 (which was intended to be only of temporary force) continuing it in force and extending its provisions to another class of debts, to wit, those issued subsequent to January 1, 1866, which had been investigated and found to be valid by the special commissioner. It follows that this objection cannot be sustained.

“(e) The act of 1892, after authorizing the sale of the 4½% Redemption Brown Consols ‘at not less than par or face value’ and directing the application of the proceeds thereof to the payment of the Brown Consols and to no other purpose, authorized and required the State Treasurer to receive from the ‘purchasers’ of the new consols, who should surrender Brown Consols before July 1, 1893, all such consols tendered by them, and to issue new 4½% consols of equal face value in lieu of and in exchange for Brown Consols so surrendered. It was further provided that the ‘holders’ of the 4% Redemption Brown Consols should have the right to surrender them and receive in exchange therefor 4½% Redemption Brown Consols of equal face value ‘as provided in this act.’ The supplementary act of December 22, 1893, provided for surrender by the holders of all bonds and stocks refundable in Brown Consols and the issuance of 4½% Redemption Brown Consols directly in exchange therefor upon the same terms upon which they were refund-

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able in Brown Consols. Five million four hundred and one thousand nine hundred and fifty-five dollars and eighty-six cents of the $4\frac{1}{2}\%$ Redemption Brown Consols now outstanding were issued in the fiscal year ending October 31, 1893, and the remaining \$220,556.11 were issued subsequently. Of the former, \$5,250,000 were issued to a purchasing syndicate pursuant to a contract made in March, 1893, \$150,926.57 were issued to holders of 4% consols in exchange for a like amount of such consols, and \$1,029.29 were issued to holders of Brown Consols issued after July 1, 1893, in exchange for a like amount of such consols, making a total of \$5,401,955.86. The syndicate purchased the new consols at 'par flat,' that is, at the face value, without including accrued interest, and made payment of \$2,929,596.74 in cash and \$2,320,403.26 in Brown Consols of equal face value, making a total of \$5,250,000. The bonds issued to the purchasing syndicate and paid for in cash were issued at various times, beginning May 16, 1893, and ending July 8, 1893. The bonds issued to the purchasing syndicate and paid for in Brown Consols were issued at various times, beginning May 16, 1893, and ending July 10, 1893. The \$5,250,000 of Redemption Brown Consols issued to the purchasing syndicate exceeded by \$20,113.80 the amount (\$5,229,886.20) of Brown Consols then outstanding and refundable under the act of 1892, as shown by the first schedule appended to paragraph 18. This over issue was due to the fact that in estimating the amount of Brown Consols to be redeemed on July 1, 1893, the date of their maturity, the officers who made the contract with the purchasing syndicate allowed some margin for such Brown Consols as might be issued between the date of the contract and July 1, 1893 (there being still outstanding many bonds and stocks exchangeable for Brown Consols), and the amount of Brown Consols issued during such period was not as large as was expected. Of the \$2,929,596.74 in cash received in 1893 from the purchasing syndicate for Redemp-

tion Brown Consols, sold as aforesaid, the sum of \$1,746.65 still remains in the treasury; the sum of \$20,919.51 was applied in 1894 to the payment of Green Consols (without authority of law); and the remainder of the cash received from the purchasing syndicate was applied to the payment of Brown Consols. The issuance of said \$20,113.80 of Redemption Brown Consols in excess of the amount of Brown Consols refundable under the act of 1892 was not authorized by the act of 1892, and was an attempt to increase the debt of the State without an election, in violation of section 11 of article X of the State Constitution of 1895. Said \$20,113.80 of invalid consols were among \$22,525.56 of consols issued on July 5, 6 and 8, 1893 (after issuance of all other consols sold to the syndicate and paid for in cash), and as they can not be distinguished by date of issue from the remaining portion of said \$22,525.56 of consols, all of said \$22,525.56 of consols must be deemed invalid. (State Treasurer's report for 1893, pp. 7, 8, 114.)"

The following findings of the referee, as to the allegations contained in this subdivision, to which no exception has been taken, show that this ground of objection cannot be sustained:

"I, therefore, conclude as matter of fact:

1. "That there was no over issue of Redemption Brown Consols under the act of 1892, and that the entire proceeds of said issue of bonds, with the exception of the sum of \$1,746.65, now in the State treasury, has been used in the payment, redemption and retiring of Brown Consols and 4% Brown Redemption Consols.

2. "That no part of the said sum of \$20,113.80, being the difference between the proceeds of sale of the Redemption Brown Consols and the amount of outstanding Brown Consols refundable under the act of 1892, as shown by the treasurer's report and alleged in said subdivision (e) of said paragraph 20 of petition, was used in the payment or

redemption of Green Consols, but that the whole of said sum, with the exception of the amount now remaining in the treasury, was used for the payment, redemption and retiring of Brown Consol Bonds and Stocks."

"(j) In the present year, \$1,160 of Redemption Brown Consols were issued in exchange for coupon bonds and coupons of the issue known as Funding Bills of the Bank of the State Bonds, pursuant to an act passed in January, 9 1912 (27 Stat. 922). As said bonds matured in 1888, they and the coupons thereof ceased in 1908 to be debts of the State, by reason of the act approved February 25, 1896, entitled 'an act to limit the time in which coupon bonds payable to bearer and their coupons of the State may be consolidated, converted, funded or paid, and to repeal conflicting laws,' which act prohibits the refunding of coupon bonds and coupons thereof after the expiration of twenty years from the date of maturity of such bonds. The attempt to revive said debts by said act of 1912, and the refunding thereof by exchange for Redemption Brown Consols constituted an attempt to increase the indebtedness of the State without an election, in violation of section 11 of article X of the State Constitution, and, therefore, said \$1,160 of Redemption Brown Consols are not binding obligations of the State."

The effect of the act of 1896 was not to destroy any valid bond debt of the State, after the expiration of twenty years from the maturity of such bond, but it was merely to prevent the treasurer from refunding any such bond after the lapse of that time. It is a well settled principle of law that the fact that a debt may be barred by a statute of limitations does not affect its validity, or the moral obligation to pay it. It is none the less a debt. The only effect of such a statute is to close the door of opportunity afforded by the law to collect it. Therefore, providing for the payment or refunding of such a debt does not increase the debt of the State. In

numerous other instances mentioned in the petition the bar of a statute was removed by subsequent legislation.

The petitioner's next contention is that, though the consols issued under the act of 1892 are all dated January 1, 1893, they were not actually issued until later dates, and as

the act reserves to the State the right to redeem
10 them at any time after twenty years from "the date
of issue," the commission have no right to call and
redeem them until after twenty years from the dates when
they were actually issued.

The phrase "date of issue" means the date which the bonds and stocks bear, and not the date when they were actually issued, in the sense of being signed and delivered and put into circulation.

The act of 1892 provides that the Sinking Fund Commission shall invest all sums which may come into their hands from time to time in the consols issued under that act and
hold same as assets of the sinking fund, collecting the

11 interest thereon, and reinvesting the same in said
consols, so that the sinking fund should be cumulative. Petitioner, therefore, contends that the commission have no right to cancel the Redemption Brown Consols which they have called for payment, but should hold the same as assets of the sinking fund under the aforesaid provision of the act.

That provision of the act was intended to make the sinking fund cumulative, only until the time should arrive for the final redemption of the bonds and stocks for the payment of which it was set apart, when, of course, it was intended that it should be used for that purpose. That time has arrived, and, by the express terms of the act, the State now has the right to call in and pay or redeem the whole or any part of the bonds and stocks issued under that act. Therefore, the commission should cancel the bonds and stocks so redeemed.

It is, therefore, ordered, that the commission be at liberty to carry out the provisions of the act of 1912 in accord with the views and principles herein announced.

MR. JUSTICE WATTS. While I do not think there was a quorum present at the meeting on December 13, 1913, as Hon. W. L. Mauldin, chairman of Finance Committee of the Senate, was dead, and Hon. L. J. Browning's, chairman of Ways and Means Committee of the House of Representatives, term had expired, his successor elected as a Representative, yet for the reasons given by Mr. Justice Hydrick, I think this was not fatally defective, and I concur in the result of his opinion.

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ALDRICH v. SOUTHERN RAILWAY COMPANY.

1. CARRIER—FREIGHT RATES.—An error in quoting interstate rates which has been filed with the interstate commission and published should not prevent a carrier from collecting the rate fixed by the commission.
2. IBID.—IBID.—Where a carrier refuses to transport freight except for an unlawful rate, it is liable to the shipper for damages.
3. IBID.—IBID.—Loading cotton seed into cars at carrier's station into cars furnished by it at the shipper's request is sufficient to warrant the inference of tender for shipment, and the quoting by carrier of an unlawful rate is sufficient to justify the inference of a refusal to ship except upon payment of such unlawful rate.
4. IBID.—JURISDICTION.—The Court of Common Pleas has jurisdiction of an action to recover damages for overcharges for an interstate shipment.
5. DAMAGES resulting from overcharges on an interstate shipment are not special.
6. IBID.—Measure of damages in such case is not the difference between the rate quoted and the correct rate.
7. EVIDENCE.—Letter of a carrier's agent quoting an incorrect rate on an interstate shipment is competent on the issue of damages for charging an incorrect rate.

8. *IBID.*—MARKET VALUE.—One knowing the market value of a commodity in a foreign market by his having been there, having sold the commodity there through others and accepting their reports of sales, may testify as to such value.

Before W. B. DE LOACH, special Judge, Barnwell, November, 1911. Affirmed.

Action by Alfred Aldrich against Southern Railway Company and South Carolina Railway—Carolina Division. Defendants appeal.

Messrs. B. L. Abney and Harley & Best, for appellants, cite: *Special damages cannot be recovered in this case*: 83 S. C. 501; 85 S. C. 19; 81 S. C. 536; Moore on Cor. 432; 91 S. C. 417; 75 S. C. 355; 59 S. C. 539. *No officer of the carrier can alter the rate to bind the carrier in damages*: 12 I. C. C. R. 418; 27 S. C. R. 358; 202 U. S. 242; 204 U. S. 445; 16 I. C. C. R. 479; 158 U. S. 98; 39 S. E. 144; 40 S. W. 899; 23 S. W. 1020; 43 L. R. A. 385; 50 S. W. 871; 21 S. E. 995; 5 S. W. 435; 49 S. W. 913; 63 Mo. App. 145; 209 U. S. 56; 6 I. C. C. R. 85; 4 I. C. C. R. 385; 9 I. C. C. R. 216.

Messrs. R. C. Holman and W. H. Townsend, contra, cite: *State Court has jurisdiction*: 204 U. S. 436; 223 U. S. 71; 88 S. C. 365; 130 S. W. 562; 123 Fed. 792; 15 I. C. C. R. 37; 69 S. E. 618; 216 U. S. 122. *Measure of damages*: 10 I. C. C. R. 696.

September 12, 1913. The opinion of the Court was delivered by

MR. JUSTICE HYDRICK. For several seasons prior to 1909-10, the plaintiff had engaged in buying cotton seed and shipping them to Mexico, over the Atlantic Coast Line Railroad, for sale for planting purposes. Defendant's agent at

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Barnwell solicited the business, and plaintiff told him that, if defendant would give him better rates than the Coast Line, he would ship over defendant's road.

It appears from the evidence that it is quite difficult, if not impossible in some cases, for the local railroad agents to figure out from the schedules or rates filed and published, the correct rate applicable to interstate shipments; and it is especially difficult, when the matter is complicated, as it was in this case, by the fact that the units of weight and value in the two countries are different, and the rate of exchange between them is variable. Hence the defendant's local agent referred the matter to the general freight agent, who testified that he was employed especially for that purpose.

On October 16, 1909, he wrote plaintiff that the rate on seed in carload lots, from Barnwell, S. C., to Torreon and Gomez Palacio, Mexico, was 90½ cents per hundred pounds. According to the schedule of rates filed with the Interstate Commerce Commission at that time, and published, the correct rate was 97½ cents per hundred pounds.

Sometime after receiving this letter, plaintiff made requisition on defendant's local agent for a number of empty cars to be loaded for shipment. On October 26 or 27, after plaintiff had loaded two cars, and was loading the third, defendant's local agent informed him that an error had been made in quoting the rate, and that it was 10 cents a hundred more than the rate quoted. That would have made the rate 100½ cents per hundred. Plaintiff told the agent that he could not use that rate, and, thereafter, he shipped the seed in the two cars, which he had already bought and paid for, to an oil mill in Columbia, S. C., and sold them at a loss. Thereafter, on October 30, but after plaintiff had sold the seed which he intended to ship to Mexico, defendant's general freight agent informed plaintiff that the correct rate was 97½ per hundred. Plaintiff would have paid the correct rate if he had been informed what it was before he had sold the seed.

This action was brought to recover damages for loss of profits on the sale of twenty-five carloads of seed contemplated and contracted for. Plaintiff testified that he paid not exceeding \$24 per ton for the seed he bought, and that they were worth \$37.50 per ton in Mexico. He also testified that he actually bought and paid for only the two carloads mentioned, and that the persons with whom he had contracted to buy other seed released him from liability on his contracts. He claimed damages for the loss of profits on twenty-five carloads; but the Court instructed the jury that he could recover only the damages which he actually sustained. The verdict was in his favor for \$390. In view of the evidence of the plaintiff above stated, and the instruction above stated, and the amount of the verdict, we conclude that the jury awarded damages only for the loss of profits on the two carloads of seed which plaintiff actually bought and paid for and tendered to defendant for shipment.

According to the undisputed evidence, the Court ruled and instructed the jury that 97½ cents,—the rate which had been filed with and approved by the Interstate Commerce Commission and published,—was the lawful rate, and

1 the only rate which defendant could lawfully charge or collect; that defendant was bound by law to charge and collect that rate—no more and no less—and that, if defendant refused to receive and transport the seed, except upon payment of a higher rate, it was liable to plaintiff for the resulting damages.

We think the Court was right in this ruling and instruction. No error in quoting a rate which has been filed with the commission and published will be allowed to prevent a carrier from collecting the correct rate applicable to an interstate shipment. *Gulf etc. R. Co. v. Hefley*, 158 U. S. 98, 39 L. ed. 910; *Texas etc. R. Co. v. Mugg*, 202 U. S. 242, 50 L. ed. 1011; *Texas etc. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. ed. 553. Such an error is not binding

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upon either carrier or shipper, because both are presumed to know the correct rate. *United States v. Miller*, 223 U. S. 599, 56 L. ed. 569; *Chicago etc. R. Co. v. Kirby*, 225 U. S. 155, 56 L. ed. 1038; *Adams Express Co. v. Croninger* (U. S.), decided January 6, 1913, advance sheets L. ed. No. 6, p. 148; *Kansas City Southern R. Co. v. Carl*, 227 U. S., decided March 10, 1913, 33 Sup. Ct. Rep. 397. Nor does such an error subject a carrier to liability for damages resulting from any action taken by an intending shipper in reliance upon the quoted rate. *Illinois Central R. Co. v. Henderson Elevator Co.* (U. S.), decided January 6, 1913, advance sheets L. ed. No. 6, p. 176. In the Carl case, the Court said: "Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay. The shipper's knowledge of the lawful rate is conclusively presumed, and the carrier may not be required to surrender the goods carried upon the payment of the rate paid, if that was less than the lawful rate, until the full legal rate has been paid. *Texas etc. R. Co. v. Mugg*, *supra*. Nor is the carrier liable for damages resulting from a mistake in quoting a rate less than the full published rate. *Illinois C. R. Co. v. Henderson Elevator Co.*, 226 U. S. 441, decided January 6, 1913, advance sheets L. ed. No. 6, p. 176. Nor can a carrier legally contract with a particular shipper for an unusual service, unless he make and publish a rate for such service equally open to all. *Chicago etc. R. Co. v. Kirby*, *supra*." It follows, therefore, that, if plaintiff's right to recover had depended solely upon defendant's error in quoting the rate and on the action which he claims to have taken on the faith of the quoted rate, his complaint should have been dismissed.

But the allegations and the evidence involve something more,—to wit, the refusal of defendant to receive and carry the shipment, except upon the payment of an unlawful

charge. If the fact be that defendant did so refuse,
2 it incurred liability for the resulting damages.

Avinger v. S. C. R. Co., 29 S. C. 265, 5 A. & E. Enc. L., 2d 158. In the Abilene case, the Supreme Court of the United States said: "Without going into detail, it may not be doubted that, at common law, where a carrier refused to receive goods offered for carriage except upon the payment of an unreasonable sum, the shipper had a right of action in damages * * *. As the right to recover, which the Court below sustained, was clearly within the principles just stated, and as it is conceded that the act to regulate commerce did not in so many words, abrogate such right, it follows that the contention that the right was taken away by the act to regulate commerce rests upon the proposition that such result was accomplished by implication. In testing the correctness of this proposition we concede that we must be guided by the principle that repeals by implication are not favored, and indeed, *that a statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory*" (italics added). That case, and the others above cited, hold that the rate filed and published is presumed to be reasonable, and that no other can be lawfully exacted.

Under the circumstances detailed, the loading of the seed into cars furnished by defendant, with the intent of both parties that they were to be shipped to Mexico over defendant's road, was sufficient to warrant the inference of
3 a tender of them for such shipment; and the quotation of an excessive rate—even though it was done under the belief that it was the lawful rate—was enough to justify the inference of a refusal to transport the seed, except upon payment of the rate quoted. Whether, under

all the circumstances, such inferences should have been drawn were questions of fact which were properly submitted to the jury; and, under the charge, the verdict must be construed as resolving them in plaintiff's favor, and as establishing the fact that plaintiff's recovery was based upon defendant's refusal to receive and transport the seed, except upon payment of an unlawful exaction. Moreover, defendant is concluded from contending in this Court that there was no testimony tending to show such refusal, because that point was not made in the Circuit Court.

We think there can be no doubt that the Circuit Court had jurisdiction of the action. It was based on the violation of a common law duty. In the Abilene case, after stating the principles above quoted, the Court proceeded to show

4 that the remedy invoked by the shipper was so inconsistent with the provisions, purpose and intent of the act to regulate commerce that, if allowed, it would prove to be destructive of it. In construing section 22 of that act, which says that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies," the Court said: "This clause, however, cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself. The clause is concerned alone with rights recognized in or duties imposed by the act and the manifest purpose of the provisions in question was to make plain the intention that any specific remedy given by the act should be regarded as cumulative, when other appropriate common law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the act." In this case, not only does the common law afford a remedy for the particular grievance complained of, but it is entirely consistent with the provisions of the act regulating commerce, and, therefore,

by the express terms of section 22, it was preserved to the shipper. *Gibson v. R. Co.*, 88 S. C. 365, 70 S. E. 1030; *Hardaway v. R. Co.*, 90 S. C. 475; *Missouri, P. R. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612, 53 L. ed. 352; *Mondou v. New York etc. R. Co.*, 223 U. S. 1, 56 L. ed. 327; *Louisville etc. R. Co. v. F. W. Cook Brewing Co.*, 223 U. S. 70, 56 L. ed. 355; *Galveston etc. R. Co. v. Wallace*, 223 U. S. 481, 56 L. ed. 517; *Glaffin v. Houseman*, 93 U. S. 130, 23 L. ed. 833; *Copp v. L. & N. R. Co.* (43 La. Ann.), 12 L. R. A. 725; *Loughlin v. McCaulley*, 186 Pa. 517, 48 L. R. A. 33, notes.

In *Galveston etc. R. Co. v. Wallace*, *supra*, the railroad company was sued in the State Court as the "initial carrier," under the Carmack amendment, for a loss which occurred on a connecting line. Objection was made to the jurisdiction of the State Court on the ground that section 9 of the original act to regulate commerce provided that persons damaged by a *violation* of the statute "might make complaint before the commission * * * or in any District or Circuit Court of the United States." But the Court said that "damage caused by failure to deliver goods is in no way traceable to a violation of the statute, and is not, therefore, within the provisions of sections 8 and 9 of the act to regulate commerce." With regard to the matter of jurisdiction the Court also said: "Where the statute creating the right provides an exclusive remedy, to be enforced in a particular way, or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right. But jurisdiction is not defeated by implication. And, considering the relation between the Federal and State government, there is no presumption that Congress intended to prevent State Courts from exercising the general jurisdiction already possessed by them, and under which they had the power to hear and determine causes of action created by Federal statute."

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This case does not fall within the principle of the Reid case (222 U. S. 424, 56 L. ed. 257). In that case, the State Court undertook to enforce a State statute which imposed a penalty on common carriers for refusal to receive and transport goods when tendered. At the time the goods were tendered for shipment, the carrier had not filed and published a through rate as required by the act to regulate commerce, which also provided that no carrier should engage in interstate transportation until such schedule or rates were filed and published, and penalized the violation of the inhibition. It clearly appeared, therefore, that the State statute was in conflict with the Federal statute, and commanded the doing of that which the latter forbade. Necessarily the State statute was held to be void on the principle that, when Congress assumes control of any subject of interstate commerce, all conflicting State laws on the same subject are superseded. This is a necessary consequence of the supremacy of an act of Congress over the subject. For the same reason, a statute of Minnesota, which penalized interstate carriers for failure to furnish cars on demand for the initiation of interstate shipments, was held void in *Chicago etc. R. Co. v. Hardwick Farmers' Elevator Co.*, 226 U. S. , decided January 6, 1913.

This case rather falls within the principle announced in *Missouri, P. R. Co. v. Larabee Flour Mills Co.*, *supra*, in which the Supreme Court of Kansas was sustained in compelling a carrier by mandamus to transfer and return loaded and unloaded cars from the line of a connecting carrier to the flour mill of the shipper, on demand and payment of the customary charges therefor, although both carriers were engaged in interstate commerce, and three-fifths of the output of the mill was shipped out of the State. The Court held that the State Court had jurisdiction to compel the performance of the duty, which was a common law duty, in the absence of regulation of the same subject by congressional authority. There is nothing in the act to regulate commerce

which exempts a common carrier of interstate commerce from the common law liability for damages for refusing to receive and transport a shipment properly tendered, and there is nothing in the action of the State Court enforcing that liability which conflicts with any provision of that act. Therefore, under the authorities above cited, and the cases following, there was no error in overruling the objection to the jurisdiction of the Court. *Reid v. Colorado*, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488.

Under the view which we have taken of the case, the objection that plaintiff could not recover damages because there was no notice to defendant of the number of cars that

he intended to ship and of the amount of the damages

5 he would sustain as the result of defendant's delict (it being contended by defendant that the damages sued for are special damages), need not be considered, because we have seen that, under plaintiff's testimony and the Judge's charge, which we are bound to assume the jury obeyed, no damages could have been allowed, except for the loss of profits on the two carloads of seed which plaintiff had bought and paid for, and the amount of the verdict shows that none other were awarded. And as to those two cars, defendant certainly had notice of the circumstances and the purpose of the shipment. We must not be understood, however, as conceding, by these remarks, that the damages recovered were, in fact, special damages, or that it would have been necessary to the recovery of such damages that the carrier should have had notice of the number of cars intended to be shipped or of the amount of the damages which would result from any delict on its part with regard to the shipment.

Defendant's contention that the measure of dam-

6 ages was only the difference between the correct rate and the quoted rate cannot be sustained. 5 A. &

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E. Enc. L., 2d. 388; *Hope Cotton Oil Co. v. Texas & R. R. Co.*, 10, 10 I. C. C. Reports 696.

In view of the fact that the correct rate was proved by undisputed evidence and the jury were correctly instructed what it was, we cannot see how defendant could have been prejudiced by the admission of the letters of the general freight agent to plaintiff, quoting an incorrect rate. We do not concede, however, that the letters were improperly admitted. We think they were competent. The fact that the certificate of the secretary of the Interstate Commerce Commission is made *prima facie* evidence of the correctness of the rates certified implies that the rate may be proved in some other manner and by some other evidence.

There was no error in allowing the plaintiff to testify as to the market value of seed in Mexico. He testified that he knew what the market value was—and, as a basis of his knowledge, said that he had been to Mexico, and had also sold seed there through others and had received and accepted the report of sales made by them, which was a fundamental and practical test of the market value. 16 Cyc. 1143.

Judgment affirmed.

8649

OWENS v. CHARLESTON & WESTERN CAROLINA RY. CO.

APPEAL—RAILROADS.—There being evidence in the magistrate court to support the findings that a carrier unlawfully withheld from consignee a shipment and charged thereon unlawful storage, which findings were concurred in by the Circuit Court, the judgment below will not be disturbed.

Before SPAIN, J., Barnwell, March, 1913. Affirmed.

Action by Lessie Owens, by guardian, against Charleston and Western Carolina Railway Company. Defendant appeals.

Messrs. Harley & Best, for appellant.

Messrs. R. P. Searson, Jr., and Jas. M. Patterson, contra, cite: *As to punitive damages*: 61 S. C. 189; 65 S. C. 326; 88 S. C. 14.

September 18, 1913. The opinion of the Court was delivered by

MR. JUSTICE WATTS. This was an action for damages for wilfully and unlawfully withholding from the plaintiff a shipment of goods made by her over defendant railroad, and for unlawful storage charges on the same. The case was tried before a magistrate, who gave judgment for the plaintiff, upon appeal to the Circuit Court, the Circuit Judge, his Honor, Judge Spain, dismissed the appeal and affirmed the judgment of the magistrate's court. Defendant appeals to this Court and questions correctness of this ruling, and asks reversal of the same. It is sufficient to say there was some testimony to support the findings of fact of the magistrate concurred in by the Circuit Court. This Court has repeatedly decided: "If there is evidence to support a finding in the magistrate's court, concurred in by the Circuit Court, such finding will not be disturbed on appeal." *Lewis v. Railroad*, 78 S. C. 35, 58 S. E. 989; *State v. Powell*, 91 S. C. 4, 73 S. E. 1017; *Mathews v. Lumber Co.*, 91 S. C. 571, 75 S. E. 170.

Judgment affirmed.

8651

STATE v. SPEARS.

1. MURDER.—Where the evidence in a murder case warrants only a verdict of guilty of murder or an acquittal, an instruction, "If the testimony satisfies you beyond a reasonable doubt that A killed B, then the burden shifts to A to explain it and to satisfy the jury that the law excuses him. Because nothing else appearing and it

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appearing that one man killed another, the presumption is the killing was unlawful," is not error.

2. *IBID.*—SELF-DEFENSE—CHARGE.—In such a case it is not a charge on the facts for the Judge to instruct that self-defense is the pivotal question in the case.

Before GARY J., Marlboro, March term, 1913. Affirmed.

Indictment against Wilson Spears for murder. Defendant appeals.

Mr. J. K. Owens, for appellant, cites: *Proof of killing alone does not raise presumption of guilt*: 1 Archbold 752; 53 N. Y. 16; 36 Texas 523; 49 Cal. 610; 14 Fla. 499; 29 S. C. 201; 6 S. C. 185; 15 S. C. 153; 30 S. C. 74. *Eliminating all except self-defense was a charge on the facts*: 87 S. C. 407; 2 Bish., sec. 697; Clarke 167; 50 S. C. 423; 79 S. C. 184.

Solicitor J. Monroe Spears, contra.

September 20, 1913. The opinion of the Court was delivered by

MR. JUSTICE HYDRICK. This is an appeal from sentence upon conviction of murder, with recommendation to mercy. The testimony is very meagre and indefinite as to the details of the quarrel between the defendant and the deceased which seem to have arisen immediately before the fatal encounter, and to have led up to it. As well as we can gather from the testimony, there was a frolic at the house of a negro woman, named Milly Kelly, which was attended by the defendant, the deceased, and others. The deceased and Abram Mack got into a row in the house, and they and Oscar Mack, Abram's father, went out to settle their difficulty. While they were so engaged, the defendant approached them, and asked the deceased for a match. The

deceased replied, with an oath, that he had no match. After some bandying of words and oaths at each other about the match, each went home and got his gun and returned. The defendant's home was about half a mile away. When they met again, on their way back to the Kelly house, each shot the other. The defendant testified that, as he stepped into a certain path on the way back, the deceased called upon him to "halt;" that he looked and saw deceased holding up his gun to shoot, and he did shoot, and that he (defendant) threw up his gun, as quickly as he could, and shot. He explained his returning to the Kelly house by saying that he left his sister there and went back to escort her home, and that he carried his gun to protect himself.

The first exception assigns error in the following instruction: "If the testimony satisfies you beyond a reasonable doubt that Spears killed Thomas, then the burden is shifted on Spears to explain it, and to satisfy the jury
1 that the law excuses him. Because, nothing else appearing, and it appearing that one man killed another, the presumption is the killing was unlawful."

While it may not be true, as an abstract proposition, applicable under all circumstances, that the mere fact that one man has killed another will raise the presumption that the killing was unlawful, yet the charge of a trial Judge must always be construed as applicable to the facts of the case on trial. When so applied, there was no error in the instruction above quoted. The killing was done with a deadly weapon. There was no legal provocation in the first encounter of words, which could have reduced the killing to manslaughter. If there had been, there was ample cooling time. Therefore, in no possible view of the evidence would the jury have been warranted in finding a verdict of manslaughter. Under the undisputed evidence, the defendant either killed the deceased in self-defense, and was entitled to acquittal, or he was guilty of murder. That being so, and the jury having found a verdict of murder, the assignments of

error in the charge as to the law of manslaughter are immaterial, and need not be considered.

On the law of self-defense, the Court charged: "The law of self-defense arises out of necessity, actual or presumed. Right there is the pivotal question in the case." The error

assigned is that this was a charge on the facts, in that
2 it directed the minds of the jurors solely to the defense, and left out of view all questions relative to the State's case, including the question of malice. The undisputed evidence warranted the charge. Under the evidence, there was no reasonable ground for any contention as to the fact that defendant had killed the deceased, and, as we have shown, there was no legally possible ground for any other than a verdict of murder or of acquittal on the plea of self-defense. Therefore, the Judge was clearly right, when he said that was the pivotal point in the case. In fact and law, it was the only point in the case.

Judgment affirmed.

8511

STATE v. MALLOY.

1. CONSTITUTIONAL LAW—CAPITAL PUNISHMENT—ELECTROCUTION.—The act of 1912, 27 Stat., 702, changing capital punishment from hanging to electrocution, provides a more humane method of inflicting the sentence and is not, therefore, an *ex post facto* law as to him who committed the crime of murder before its enactment and tried and sentenced since.
2. EXCEPTIONS based on grounds not stated in record will not be considered.
3. EXCEPTIONS to the admission of evidence not shown to have been prejudicial to appellant will not be considered.
MR. JUSTICE WOODS *thinks the evidence here admitted was prejudicial.*
4. EVIDENCE.—AN INSTRUCTION that "the opinion of experts like any other testimony in the case must be weighed as other facts are considered" held to mean if the jury believe the testimony of an expert, they were not to disregard it.

Exceptions.

[95 S. C.]

5. **IBID.—CONFESSIONS.**—The instruction here that a free and voluntary confession is competent evidence to be considered by the jury, as it was here given in a hypothetical sense, is not a charge on the facts.
6. **CHARGE.**—An appellant who fails to present a request on a point he thinks applicable to the case, should not complain if the Judge overlooks it.
7. **JURORS.**—No abuse of discretion having been shown in the Court in standing aside a juror who had been bound over as a witness for the defense by mistake and in allowing another to be presented who had formed an opinion from hearing the testimony at the inquest, exceptions thereto are overruled.

Before SPAIN, J., Marlboro, Spring term, 1912. Affirmed.

Indictment against Joe Malloy for murder. Defendant appeals on the following exceptions:

1. "The Court erred in overruling the challenge to the array of the grand jury and in holding that it was a legal grand jury, when it was drawn from a list not made up according to law, as shown by the admitted facts set out in the plea; and they deprived the defendant of his right to be tried on a bill duly found by a legal grand jury, in violation of the Constitution of the United States and of this State.

2. "The Court erred in refusing to quash the indictment on the ground that it was found by an illegal grand jury; and thereby deprived defendant of the right given him by the Constitution of this State and of the United States to be tried on a valid indictment found by a legal grand jury.

3. "The Court erred in overruling the challenge to the array of the jury as being illegally drawn from lists illegally made up; and thereby he deprived defendant of his right, guaranteed by the Constitution of this State and of the United States, to be tried by a jury of his peers legally drawn and impanelled.

4. "The Court erred in overruling the plea in bar to the infliction of the death penalty by electrocution and the

motion in arrest of judgment, for the reason that when the crime was charged to have been committed the penalty was death by hanging; whereas, the penalty of death by electrocution was substituted by the act of 1912 and was *ex post facto* as to him; and the imposition of the sentence was in violation of the Constitution of the United States and of this State prohibiting the passage of *ex post facto* laws.

5. "The Court erred in allowing the witness, Stephen Toms, over the objection of defendant's counsel, to state that he had told the same story to one Collins before he told the same in Mr. Evans' office; the same being an effort to corroborate the witness by the fact that he had made the same statement elsewhere, and being incompetent and prejudicial and self-serving.

6. "The Court erred in charging that "the opinion of experts is like any other testimony in the case and must be weighed by the jury as other facts are considered," it being a charge on the facts and an invasion of the province of the jury, whose sole province is to weigh the evidence; and the Court cannot direct it as to the method of weighing any kind of evidence.

7. "The Court erred in charging the jury that "the free and voluntary confession of one accused of crime is competent evidence to be considered by the jury in the determination of his guilt or innocence," the same being prejudicial, in that there had been proven alleged confession of the defendant, and the charge tended to impress the jury that such alleged confessions were made, whereas, they were disputed; and the competency of evidence is passed upon when it is admitted, and its use should not be commented upon in the charge, the same being a charge on the facts.

8. "The Court erred in not charging the law of manslaughter, as there were circumstances which might have

indicated a case of manslaughter, and the same should have been defined to the jury.

9. "The Court erred in holding the jurors competent who had formed and expressed an opinion from the evidence given at the coroner's inquest when it was likely that the evidence would be the same on the trial and in not excluding them for that reason.

10. "The Court erred in standing aside the juror, R. B. Crosland, when the only charge was that he had been by mistake bound as a witness for the defense."

See 946 Criminal Code: "When the punishment of death is inflicted upon any person pursuant to the sentence of any Court, the execution shall take place within the jail or the enclosure of the jail of the county wherein such execution shall be made. No one shall be allowed to be present at such execution except the sheriff of the county or his deputy, and his assistants, the clergy, the State solicitor, the attorney or attorneys who defended the convict, the family of the convict, and not more than ten discreet persons to be named by the sheriff; which said ten persons shall be summoned by the sheriff and be required to be present."

ACT OF 1912.

Section 1. "Be it enacted by the General Assembly of the State of South Carolina, that after the approval of this act by the Governor, all persons convicted of capital crime and have imposed upon them sentence of death shall suffer such punishment by electrocution within the walls of the State penitentiary in Columbia under the direction of the superintendent of the penitentiary, instead of by hanging.

Sec. 2. "The board of directors of the State penitentiary are authorized and required to provide a death chamber and

all necessary appliances for inflicting such penalty by electrocution and pay the costs thereof out of any funds in their hands. The expense of transporting any such criminal to the State penitentiary shall be borne by the county in which the offense was committed.

Sec. 3. "Upon the conviction of any person in this State of a crime, the punishment of which is death, it shall be the duty of the presiding Judge to sentence such convicted person to death according to the provisions of this act and to make such sentence in writing, which shall be filed with the papers in the case against such convicted person, and a certified copy thereof shall be transmitted by the clerk of Court of General Sessions in which said sentence is pronounced to the superintendent of the State penitentiary at Columbia, within not less than ten days of the time fixed by the sentence of the Court for the execution of the same, and in all cases it shall be the duty of the sheriff of the county in which such convicted person is so sentenced, together with one deputy or more, if in his judgment it is necessary, to convey such convicted person to the penitentiary at Columbia, to deliver him or her to the superintendent of the State penitentiary not more than twenty days nor less than two days prior to the time fixed in the judgment for the execution of such condemned person, unless otherwise directed by the Governor, or unless a stay of execution has been caused by an appeal or granting of a new trial or other order of a Court of competent jurisdiction.

Sec. 4. "At such execution there shall be present the executioner and at least two assistants, the penitentiary surgeon and one other surgeon, if the condemned person so desires, an electrician, the condemned person's counsel and relatives, if they so desire, ministers of the gospel, not exceeding three, if they so desire, and not less than twelve nor more than twenty-four respectable citizens of this State, to be designated by the executioner.

Sec. 5. "The executioner and the attending physicians shall certify the fact of such execution to the clerk of Court of General Sessions in which such sentence was pronounced, which certificate shall be filed by the clerk with the papers in the case.

Sec. 6. "The body of the person so executed shall be delivered to relatives, and in case no claim is made by relatives for such body the same shall be disposed of as bodies of convicts dying in the State penitentiary, provided that if near relatives of the person so executed desire that the body be carried to the former home, if within the State, the expenses of such transportation shall be paid by the penitentiary authorities, who shall draw their warrant upon the county treasurer for such county from which said convict came, and said county treasurer shall pay the same and charge the item to Court expenses.

Sec. 7. "That all acts or parts of acts inconsistent with this act are hereby repealed."

Messrs. Stevenson & Prince, for appellant, cite: *The act of 1912 providing capital punishment by electrocution is ex post facto as to appellant*: 22 N. Y. 95; Cool. Con. Lim. 379; 107 U. S. 221; 39 N. Y. 418; 22 Kan. 477; 63 N. C. 140; 43 L. R. A. 154; 170 U. S. 341; 115 N. Y. 660; 44 Am. St. R. 531; 7 Am. St. R. 674; 12 Allen 424; 31 Am. St. R. 375; 176 Fed. 976; 134 U. S. 160; 142 U. S. 155; 136 U. S. 436; 31 S. C. 105; 47 S. C. 166; 49 S. C. 443; 137 U. S. 483; 196 U. S. 326.

Solicitor J. Monroe Spears and *Messrs. Rogers and Townsend*, contra. *Messrs. Rogers and Townsend* cite: *Change of punishment from hanging to electrocution since appellant committed the crime is not an ex post facto law as to him*: 7 Ency. 527, 529; 136 Cr. Code; 47 S. C. 174; 119 N. Y. 580; 7 Am. St. R. 674; 137 U. S. 734; 37 Am. St. R.

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572; 196 U. S. 495. *Failure to instruct as to manslaughter is no error here, because not requested and evidence does not require it:* 85 S. C. 233; 83 S. C. 258; 66 S. C. 449; 78 S. C. 23; 79 S. C. 125; 58 S. C. 47. *Presenting jurors who had expressed an opinion:* 19 S. C. 85; 36 S. C. 479.

April 7, 1913. The opinion of the Court was delivered by

MR. CHIEF JUSTICE GARY. The defendant was indicted and tried in July, 1912, for the murder of Prentiss Moore, on the 24th of November, 1910, and the jury rendered a verdict of guilty; whereupon the Court sentenced him to be electrocuted on the 9th of August, 1912, in the manner provided by the act, approved the 17th of February, 1912, which will be incorporated in the report of the case, together with section 946 of the Criminal Code of 1912, which prescribes the manner in which a person shall be hanged.

The defendant appealed upon exceptions, which will be reported.

The first question that will be considered is,

1 whether the said act which changed the punishment for murder, from death by hanging to death by electrocution, was unconstitutional, on the ground that it was an *ex post facto* law, as to him.

Section 109, Criminal Code of 1902, is as follows: "Whoever is guilty of murder, shall suffer the punishment of death: *Provided, however,* That in each case, where the prisoner is found guilty of murder, the jury may find a special verdict, recommending him or her, to the mercy of the Court, whereupon the punishment shall be reduced to imprisonment in the penitentiary, with hard labor, during the whole lifetime of the prisoner."

Prior to the act of 1912, the mode of execution, when the prisoner was sentenced for murder, was by hanging.

In Cooley's Constitutional Limitations, pages 319-320, the author quotes with approval, the following language of Chase, J., in the leading case of *Calder v. Bull*, 3 Dall. 386, as to *ex post facto* laws: "I will state what laws I consider *ex post facto*, within the words and the intent of the prohibition: 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was when committed. 3d. Every law that changes the punishment and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less or different testimony, than the law required, at the time of the commission of the offense, in order to convict the offender. All these and similar laws are manifestly unjust and oppressive. * * * But I do not consider any law *ex post facto*, within the prohibition, that mollifies the rigor of the criminal law; but only those that create or aggravate the crime, or increase the punishment, or change the rules of evidence for the purpose of conviction." The last sentence is quoted with approval, in *State v. Richardson*, 47 S. C. 166, 25 S. E. 220.

In the case of *Kring v. State*, 107 U. S. 221, it was held, that any law is an *ex post facto* law, within the meaning of the Constitution, passed after the commission of a crime charged against a defendant, which in relation to that offense, alters the situation of the party to his disadvantage; and no one can be criminally punished, except in accordance with the law of force, when the offense was committed.

In that case the Court quoted with approval, the following language from the case of *Hartung v. People*, 22 N. Y. 95: "It is highly probable, that it was the intention of the legislature, to extend favor rather than increased severity, towards the convict and others in her situation; and it is quite likely, that had they been consulted, they would have preferred the application of this law to their cases, rather

than that, which existed when they committed the offenses, of which they are convicted. But the case can not be determined on such considerations. No one can be criminally punished in this country, *except according to a law prescribed for his government, before the supposed offense was committed, and which existed as a law, at that time.* It would be useless to speculate upon the question, whether this would be so, upon the reason of the thing; and according to the spirit of our legal institutions, because the rule exists in the form of an express written precept, the binding force of which, no one disputes. No State shall pass an *ex post facto* law, in the mandate of the Constitution of the United States."

The Court also quoted with approval the following language of Mr. Justice Washington, in *United States v. Hall*, 2 Wash. C. C. 366: "An *ex post facto* law is one which in its operation, makes that criminal, which was not so, at the time the action was performed, or which increases the punishment, or, in short, which, in relation to the offense or its consequences, alters the situation of a party, to his disadvantage."

In *Murphy v. The Commonwealth*, 43 L. R. A. (Mass.) 154, it is said: "The objection to *ex post facto* legislation, consists in the uncertainty, which would be introduced thereby, into legislation of a criminal or penal character, and the injustice of punishing an act, which was not punishable when done, or, of punishing it in a different manner than that, in which it was punishable when done.

"But not all retroactive legislation is unconstitutional, as being *ex post facto*. The question in each case is, whether it will increase the penalty or operate to deprive a party of substantial rights or privileges, to which he was entitled, when the offense was committed; or, in short, in relation to the offense and its consequences, will alter the situation, of a party, to his disadvantage." See, also, notes to the case

of *Rooney v. North Dakota*, 196 U. S. 319, reported in Am. & Eng. Ann. Cases, 76.

A statute which merely regulates the manner, in which the execution shall be conducted, by prescribing the time and manner of the execution, and the number and character of the witnesses, is not *ex post facto*, though it applies to offenses committed before its enactment. *Holden v. Minnesota*, 137 U. S. 491.

"The objection that the later law required the execution of the sentence of death, to take place within the limits of the penitentiary, rather than in the county jail, as provided in the previous statute, is without merit. However, material the place of confinement may be, in case of some crimes not involving life, the place of execution, when the punishment is death within the limits of the State, is of no practical consequence to the criminal. On such a motion he is not entitled to be heard." *Rooney v. North Dakota*, 196 U. S. 319.

The foregoing authorities sustain the proposition, that the punishment prescribed by law for an offense, at the time it was committed, can not be changed by subsequent legislation, unless the change is advantageous to the prisoner.

The appellant's attorneys argued, that the act of 1912 was unconstitutional, by reason of the fact, that the place of execution, and the number of witnesses permitted or required by the act of 1912, were changed to the disadvantage of the defendant. The foregoing authorities, also, show, that these objections are untenable. In the language of Mr. Cooley in his excellent work entitled *Constitutional Limitations* 322: "We have no doubt, the privileges the respondent claims, were designed and created solely, as incidents of the severe punishment, to which his offense formerly subjected him, and not as incidents of the offense." In this respect the statute is analogous to those, which relate to penal administration or prison discipline, and are not unconstitutional, even though the effect may be to enhance

the severity of the confinement. *Murphy v. Commonwealth*, 172 Mass. 264.

We now come to the pivotal question, whether the act of 1912 changing the punishment for murder from death by hanging to death by electrocution, shows that its tendency is to ameliorate the punishment by hanging.

In the case of *In re Kemmler*, 136 U. S. 436, the Court had under consideration the question, whether the New York statute providing that "punishment of death, must in every case, be inflicted by causing to pass through the body of the convict, a current of electricity, of sufficient intensity to cause death," was obnoxious to the provision of the Constitution, prohibiting the infliction of cruel and unusual punishment.

The first step which led to the enactment of the law in that State, was the message of the Governor, in which he said: "The present mode of executing criminals by hanging, has come down to us from the dark ages, and it may well be questioned, whether the science of the present day, can not provide a means, for taking the life of such as are condemned to die, in a less barbarous manner. I commend this suggestion to the consideration of the legislature." The legislature accordingly, appointed a commission to investigate and report "the most humane and practical method known to modern science, of carrying into effect the sentence of death in capital cases." This commission reported in favor of execution by electricity. They also reported a proposed bill, which was enacted. Mr. Chief Justice Fuller, in delivering the opinion of the Court, said: "Punishments are cruel, when they involve torture, or a lingering death; but the punishment of death is not cruel, within the meaning of that word, as used in the Constitution. It implies there something inhuman and barbarous—something more than the mere extinguishment of life. The Courts of New York held, that the mode adopted in this instance, might be said to be unusual, because it was new, but that it could not

be assumed to be cruel, in the light of that common knowledge, which has stamped certain punishments as such; that it was for the legislature to say, in what manner sentence of death should be executed; that this act was passed, in the effort to devise a more humane method of reaching the result; that the Courts were bound to presume, that the legislature was possessed of the facts, upon which it took action; and that by evidence *aliunde* the statute, that presumption could not be overthrown. They went further, and expressed the opinion, that, upon the evidence the legislature had attained by the act, the object had in view, in its passage. * * *. Treating it as involving an adjudication, that the statute was not repugnant to the Federal Constitution, that conclusion was so plainly right, that we should not be justified in allowing the writ, upon the ground that error might have supervened therein. * * *. The enactment of this statute was, in itself, within the legitimate sphere of the legislative power of the State, and in the observance of those general rules, prescribed by our systems of jurisprudence; and the legislature of the State of New York, determined that it did not inflict cruel and unusual punishment, and its Courts have sustained that determination. We can not perceive that the State has thereby abridged the privileges or immunities of the petitioner, or deprived him of due process of law.

“In order to reverse the judgment of the highest Court of the State of New York, we should be compelled to hold, that it had committed an error, so gross, as to amount, in law, to a denial by the State, of due process of law, to one accused of crime, or of some right secured to him, by the Constitution of the United States.

“We have no hesitation in saying, that this we can not do, upon the record before us.” The writ of error was accordingly denied.

It is true the provision of the United States Constitution now under consideration, was not before the Court in that

case, but the decision clearly shows, that the Court regarded electrocution, as a more humane method of punishment, than that by hanging. It would have been surprising if the Court had reached any other conclusion, after considering the manner in which an execution by hanging is conducted. The rope around the prisoner's neck must be of the proper length, and so adjusted that when he drops from the scaffold, his neck will be broken, thus destroying the structural formation of the body. But suppose the rope is not of the proper length, or the noose is not properly adjusted, then there are instances on record, where the head was completely severed from the body, when the convict dropped from the scaffold. There are also numerous instances, where the neck was not broken, and the convict died of strangulation, after several minutes of consciousness. We merely mention the agony, which must have been suffered, during strangulation as indicated by the bulging eyes, and draw the curtain over such a picture. Suffice it to say, that this Court is satisfied, that electrocution is a more humane method of execution than by hanging.

The exception raising this question, is, therefore, overruled.

The ruling of the Court upon the former appeal in this case, shows that the first, second and third exceptions can not be sustained.

The fourth exception has already been considered.

- There are two reasons, why the fifth exception
- 2 can not be sustained. In the first place, the grounds of objection were not stated, and, in the second place,
 - 3 it has not been made to appear, that the rights of the defendant were thereby prejudiced.

The sixth exception is overruled, for the reason

- 4 that his Honor, the presiding Judge, simply meant to tell the jury, that if they believed the testimony of an expert, they were not to disregard it, merely because the witness was testifying as an expert.

The seventh exception can not be sustained, for the
5 reason that the remark of the presiding Judge was
general, and was to be understood, as if it had been
preceded by the word "if."

The eighth exception is overruled, for the reason
6 that the defendant failed to present a request, to
charge the proposition, for which he now contends.

The ninth and tenth exceptions can not be sus-
7 tained, for the reason that the record fails to show an
abuse of discretion, on the part of the presiding
Judge, in ruling upon the competency of the jurors therein
mentioned.

It is the judgment of this Court, that the judgment of the
Circuit Court be affirmed, and that the case be remanded to
the Circuit Court, for the purpose of having another day
assigned, for carrying into execution the sentence of the
Court.

MR. JUSTICE WOODS, *dissenting*. Early in the morning
of 24th November, 1910, Guy Rogers, a youth of about
seventeen years, and his friend, Prentiss Moore, several
years younger, left the homes of their parents, in Bennetts-
ville, for a morning's hunt, with the expectation of returning
in time for dinner. Upon their failure to return, the com-
munity united in a long and harrowing search, which
resulted in finding the bodies of both the boys in a ditch
about eleven hundred yards from the house of the defend-
ant.

Prentiss Moore was killed by a gunshot wound in the back
near the shoulder blade. The facts that the shot were some-
what scattered, and that there were no powder burns indi-
cated that the shot was fired at least a little distance off.
While the wound was necessarily fatal, some minutes might
have intervened before death. The gunshot which killed
Guy Rogers seems to have entered, in almost a solid mass,
in front near the left nipple, making powder marks on the

body, and leaving the gun wad sticking to the wound. Death must have been almost instantaneous. The body of Guy Rogers was lying in the ditch, and that of Prentiss Moore leaning against the side of the ditch. The one double-barrel shotgun which the boys had was lying on the side of the ditch, and near by was an empty shell.

The defendant was indicted and tried for the murder of Gay Rogers, and this appeal is from his conviction and sentence to death.

I concur in the reasoning and the conclusions of the Chief Justice as to all the exceptions except the fifth.

The case of the State depended on some circumstances alleged to be unfavorable to the defendant, but

3 mainly on the testimony of Charlotte Easterling and Stephen Toms, both negroes, as to confessions to them by the defendant that he had killed the boys.

The witness, Charlotte Easterling, as was agreed on all sides, was utterly discredited by her numerous contradictions of herself. These contradictions culminated in her testifying at the trial to a confession of the defendant, and then confessing in private to the solicitor and on the stand that no confession had been made to her. The witness, Stephen Toms, then testified to confessions made to him, and was allowed to bolster up his statement by stating that at a certain time and place he had told one Collins of the defendant's confession. This testimony was clearly incompetent. *State v. Thomas*, 3 Strobb. 269; *State v. Scott*, 15 S. C. 434; *State v. Gilliam*, 66 S. C. 419, 45 S. E. 6; *State v. McDaniel*, 68 S. C. 304, 47 S. E. 384; and I am convinced that it was also prejudicial, especially in view of the fact that the defendant introduced testimony tending strongly to show that Toms was a professional witness having a bad reputation for veracity.

It seems to me that careful consideration of the evidence is convincing that the tragedy was one of deep mystery—requiring on the part of the jury most careful and anxious

consideration of every particle of evidence before they could reach a verdict. They had to answer these serious questions: Were the boys murdered and thrown into the ditch, or was the tragedy due to an unusual and unexplainable accident? Was there any sufficient motive for the defendant to commit such a dreadful and monstrous crime? Were the circumstances proved by creditable testimony affecting the defendant not consistent with his innocence? Were the confessions attributed to defendant really made by him, or were the witnesses who testified to them shown to be unworthy of belief? It cannot be doubted that the testimony as to the confessions was the strongest adduced against the defendant; and when the character of the witnesses from which this testimony came is considered, the conclusion seems irresistible that it was the right of the defendant to have excluded all incompetent testimony as to the confessions imputed to him, and denied by him, which may have contributed to the verdict.

This Court has set its face against technical objections to testimony and appeals depending on errors which do not affect the merits. But I am forced to the conclusion that in a case so full of mystery, justice requires that no material testimony set down by the law as incompetent should be admitted to effect the conclusion of the jury.

For this reason, I think the judgment should be reversed and the cause remanded for a new trial.

This case was held up on petition for writ of error to United States Supreme Court.—REPORTER.

8652

STATE v. VAUGHN.

1. JURORS.—If appellant does not show abuse of discretion in trial Judge in standing aside and presenting jurors, exception thereto will not be considered.
2. *IBID.*—Where a defendant during trial withdraws his plea of *not guilty* he cannot afterwards insist on appeal that there was error in empannelling the jury.
3. CAPITAL PUNISHMENT—ELECTROCUTION.—The act 27 Stat. 1912, substituting electrocution for hanging, is not an *ex post facto* law when applied to the punishment of a crime committed before its enactment.
4. PLEADING—WAIVER.—Where a defendant after going to trial on a plea of not guilty, withdraws the plea by statement of his counsel to the effect that the only issue to be referred to the jury was “recommendation to mercy,” and it was so understood and acted upon by all the parties and the Court without objection, he cannot after verdict of “guilty” insist that the Court should not have permitted him to withdraw his plea without explaining to him its effect. Nor that the plea is not binding because not taken by the Court according to the rules of accepting pleas.

Before R. O. PURDY, special Judge, Greenville, October, 1912. Affirmed.

Indictment against T. U. Vaughn. Defendant appeals.

Messrs. McCullough, Martin & Blythe cite: *Statute providing for electrocution is ex post facto*: 134 U. S. 171; 43 L. R. A. 157; 37 A. S. R. 587. *Court should advise prisoner of effect of plea*: 14 C. Dig. 1233; 22 L. R. A. (N. S.) 463; 41 Cal. 458; 73 At. 637; 88 S. C. 225; 12 Cyc. 353; 42 Miss. 639; 63 S. C. 170.

Solicitor P. A. Bonham and *Mr. J. J. McSwain*, contra. *The Solicitor* cites: *As to indifference of juror*: 65 S. C. 242; 69 S. C. 295. *Defendant is guilty under doctrine of*: 88 S. C. 225.

STATEMENT OF FACTS.

The defendant was placed on trial, under an indictment containing three counts—the first charging him with rape upon Etta Jackson, the second with intent to ravish her, and the third with carnal knowledge of her, she being a woman-child under fourteen years of age.

After the trial had proceeded from the 24th until the 26th of October, 1912, the record shows that the following took place:

“Mr. Martin: May it please the Court, after consultation with the Solicitor and the gentlemen representing the State, and with the defendant himself, we have reached an agreement that at this stage the defendant will withdraw his plea of ‘not guilty’ and enter a plea of ‘guilty’ with the understanding that he may go upon the stand and make a full statement, or such statement as he may desire, to the Court and the jury, and the only question which we will submit to the jury, without argument, is the question of a recommendation to mercy.”

“Mr. Bonham: With the understanding that this is not accepted by the State as a compromise at all, but that it will shorten affairs, and prevent the necessity of offering further testimony along this line, and save the other little girls of the embarrassment of going on the stand and testifying. We are willing to submit the matter to the jury, twelve fair-minded men, as to what punishment shall be inflicted upon this man. We want it understood that this is no compromise at all. We consider that all the jury wants to know is the truth, and we only agree to this in order that the case may be determined without going into next week.”

T. U. Vaughn, the defendant, then took the stand as a witness, and on cross-examination of the Solicitor, thus testified:

“Now you have pleaded guilty to these charges, and have thrown yourself on the mercy of the Court and jury. You don’t want to conceal anything from the jury? No, sir.

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You want them to know the entire enormity of your offense out there? Yes, sir; there is nothing hidden in my heart. Then you do not deny that Etta Jackson is the only little girl out there that you have ruined? (To his counsel: Must I answer that?) (Mr. Martin: Yes, tell the truth.) Yes, I do not deny it. You had intercourse with Della Cooper? Not at the Home. But you had intercourse with her? Yes, sir. You had intercourse with Beulah Dunnoway? Yes, sir. You had intercourse with Sadie Craig? Yes, sir. You had intercourse with Mamie Corbin? No, sir. You had intercourse with Blanche Fowler? Yes, sir. Five little girls out there, with whom you bore the relationship of parent and child, and whom you ruined? Yes, sir; to my shame I must admit it. Mr. Vaughn, you are here asking for the mercy of the Court and jury. Did you at the time you were having intercourse with these little girls, realize that your act blighted their lives? I didn't; I couldn't have realized it; now I do."

At the close of his testimony, the record shows that the following took place:

"By Mr. Patton, foreman of the jury: You said that you had intercourse with these girls. I want to know if they consented to what you did? I will say this, that actually no force was ever used. I assume full responsibility for what was done, in that I stood in the attitude of a father to them. I hate to say that, but there was never anything done without their consent. What age were they? I don't know. I suppose from fourteen to fifteen years old, and on up."

His Honor, the presiding Judge, in charging the jury, thus explained the nature, and the force and effect of the defendant's plea: "After the State had offered a number of witnesses, on the charges brought against the defendant, and after their testimony had been taken in open Court, the defendant appeared before you in open Court and withdrew his plea of 'not guilty' with the understanding that he be allowed to make a full statement before you, with the right

of cross-examination on the part of the State. In other words, he was to go on the witness stand as a witness, and make his statement, which he did make to you, and then withdrew his plea of 'not guilty' and entered a plea of 'guilty.' While it is out of the usual order of things, yet counsel thought that by taking this method, they would stop further inquiry on the part of the State, and stop the necessity of taking further testimony before you.

"Had this case gone on in the usual manner, and come before you at the conclusion of the testimony, it would have been my duty to charge you that you should consider each count in the indictment separately. In other words, if you believed that the testimony, beyond a reasonable doubt, warranted a conviction as to rape, then you can find the defendant guilty, with or without recommendation to mercy. Or, if not guilty of that, then you should consider the other charges made against him, and if found guilty you could convict him in accordance with the testimony. If found not guilty, you should say so. It would have been my duty to call your attention to these various counts, and to have instructed you, that if you did not convict on one count, you could convict on either of the other two counts, and that your verdict should say on what charges you convicted him. If you found him not guilty, you should say 'not guilty.'

"Now all that aspect of the case is changed. He has withdrawn his plea of 'not guilty' and entered a plea of 'guilty.' So that now, gentlemen of the jury, it is for you to consider all the facts and circumstances surrounding the case and determine whether or not you should recommend him to the mercy of the Court. That is the whole issue for you. Because the plea of guilty carries with it a plea of guilty to the highest offense charged in the indictment, and that is the whole question for you. It is for you to say, whether the death penalty shall be inflicted. If you should come in and say 'guilty,' that would mean that in due time the defendant would be taken to the electric chair and there suffer the

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penalty of death. If you say that you will recommend him to the mercy of the Court, and you understand that his plea is entered with the understanding that you shall consider his case, it will be my duty to sentence the defendant to hard labor in the penitentiary for a period of not less than five years nor more than forty years.

"You have heard the testimony; you have heard his statement. You are just as capable of understanding the nature of this case as I. His plea has been made in open Court, and it is for you to consider all the facts and circumstances, as you have heard them brought out on the stand, and it is for you to say whether you will write your verdict 'guilty' or whether you will recommend him to the mercy of the Court."

The jury found a verdict of "guilty" and the Court imposed upon the defendant, the sentence of death by electrocution, on the 20th of December, 1912, whereupon he appealed upon the following exceptions:

(1) "Because his Honor erred, it is respectfully submitted, in rejecting the proposed juror, N. J. Rector, there being no sufficient evidence in law of bias or other disqualifications, and error in refusing motion for new trial upon this ground.

(2) "Because his Honor erred, it is respectfully submitted, in rejecting the proposed juror, J. B. Brockman, there being no sufficient evidence in law of bias or other disqualifications, and error in refusing motion for new trial upon this ground.

(3) "Because his Honor erred, it is respectfully submitted, in rejecting the proposed juror, G. W. Morrow, there being no sufficient evidence in law of bias or other disqualifications, and error in refusing motion for new trial upon this ground.

(4) "Because his Honor erred, it is respectfully submitted, in accepting the juror, Avery Patton, against defendant's objection, since he should have been excluded for bias,

and error in refusing motion for new trial upon this ground."

(5) and (6) Exceptions were abandoned.

(7) "Because his Honor erred, it is respectfully submitted, in sentencing defendant to electrocution in the State penitentiary, under the direction of the superintendent of that institution, in accordance with act of 1912, 27 St. at L. 702, since as to the case at bar, the said act was unconstitutional in that it is an *ex post facto* law, and therefore contravenes article 1, section 8 of the South Carolina Constitution of 1895, and also article 1, section 9 of the United States Constitution, and is therefore void.

(8) "Because his Honor, in charging in substance that the plea of not guilty was withdrawn and a plea of guilty substituted, when defendant did not, and was not required to enter such plea in person, either orally or by sign of assent, as required by law in a capital case—especially since his statement on the stand was a denial of guilt, and both the Court and defendant's counsel erred in construing such statement as a confession of guilt; it was a confession of guilt of great moral wrong, but not of rape or other charge of this indictment.

(9) "Because his Honor erred in failing to charge that the issue as to whether defendant was guilty or not guilty was one of the issues in this case—

(a) Because he had not personally entered a plea of guilty as required by law—

(b) Because his sworn testimony not only did not amount to a confession of any offense charged in the indictment, but contradicted the plea of guilty as to each and every offense.

(10) "Error of his Honor, the presiding Judge—

(a) In failing to advise the prisoner of the nature and consequences of his plea, and

(b) In failing to have it affirmatively appear that the alleged plea of the confession was voluntary—as the law requires in capital cases."

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MR. CHIEF JUSTICE GARY, after stating the facts as above, delivered the opinion of the Court: The first, second, third, and fourth exceptions will be considered together.

- 1 There are two reasons why these exceptions cannot be sustained: (1) The defendant's attorneys have failed to show an abuse of discretion on the part of his Honor, the presiding Judge, and (2) the right to
- 2 insist upon the errors assigned, was waived when the defendant withdrew his plea of "not guilty."

The fifth and sixth exceptions will not be considered, for the reason that they were abandoned.

- The recent case of the *State v. Malloy*, ante 441,
- 3 which was decided by this Court, shows that the seventh exception cannot be sustained.

The eighth, ninth, and tenth exceptions will be considered together. Conceding that the defendant would have been entitled to all the rights claimed in these exceptions, if he had insisted upon them, in the manner provided by

- 4 the rules of practice, nevertheless, it clearly appears that he waived such rights in expectation that the jury would recommend him to the mercy of the Court, thereby enabling him to escape the death penalty. At the time he withdrew his plea of "not guilty" he had no reasonable grounds for supposing that the jury would render any other verdict than that of "guilty," and the method which he adopted, it would seem, might naturally have been expected to increase his chances of appealing to the sympathy of the jury, and thereby induce them to recommend him to the mercy of the Court.

There is no doubt that the defendant had the right to waive compliance with the technical forms of law, as to the manner in which his plea should be accepted.

"Waiver is voluntary, and implies an election to dispense with something of value, or forego some advantage, which the party waiving it, might at his option have demanded or

insisted upon. A waiver takes place, when a man dispenses with the performance of something which he has a right to exact. A party may waive a constitutional as well as a statutory provision for his benefit, as a trial by jury, though that mode is guaranteed to him by the Constitution; and when waived by such party, he will be estopped from setting them up, or claiming them." Herman on Estoppel & Res. Judicata, vol. 2, page 954.

The same author, at page 958, says: "A defendant has a constitutional right to a speedy trial, yet he may waive this provision by obtaining a continuance. He may plead guilty, which generally dispenses with a jury trial." "* * * A defect in the Constitution or organization which does not prevent the presence of twelve competent jurors, by whose votes the indictment is found, and which could have been cured, if the attention of the Court had been called to it at the time, or promptly remedied by the empanelling of a competent grand jury, is waived if the defendant treats the indictment as sufficient, pleads not guilty, and goes to trial on the merits of the charge. There is good sense in this conclusion. The indictment is the charge of the State against the defendant, the pleading by which he is informed of the fact, and the nature and scope of the accusation. When the indictment is presented, that accusation made, that pleading filed, the accused has two courses of procedure open to him. He may question the propriety of the accusation, the manner in which he has been presented, the source from which it proceeds, and have these matters promptly and properly determined, or waiving them, he may put in issue the truth of the accusation, and demand the judgment of his peers on the merits of the charge. If he omits the former and chooses the latter, he ought not, when defeated on the latter, when found guilty of the crime charged, to be permitted to go back to the former, and inquire as to the manner and means by which the charge was presented." The foregoing language and that from

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Herman on Estoppel and Res Judicata were quoted with approval in the case of the *State v. Faile*, 43 S. C. 52, 20 S. E. 798, in which there was an appeal from the sentence of death.

Nothing was omitted during the trial of which the defendant has just cause of complaint. He, his attorneys, the presiding Judge, and the jury, unquestionably understood fully the nature, force and effect of the plea made by the defendant; he was represented by exceedingly able counsel; the plea was not interposed until two days after the commencement of the trial; the presiding Judge clearly stated the nature, force and effect of the plea, to which neither the defendant nor his counsel made any objection; the testimony which had then been introduced indicated that there were no reasonable grounds for hoping that the jury would render any other verdict than that of guilty.

These exceptions are, therefore, overruled.

It is the judgment of this Court that the judgment of the Circuit Court be affirmed and that the case be remanded to that Court for the purpose of having another day assigned for carrying into execution the sentence of death, imposed upon the defendant.

The remittitur in this case is held up so that appellant may apply for writ of error to United States Supreme Court if so advised, notice of which intention has been given.

8653

STATE EX REL. BATES v. BOARD OF COUNTY COMMISSIONERS.

CHAIN GANG.—Under the proviso to sec. 957 of the Code of 1912, the county chain gang should not be worked as near as a town block to the employees of a road contractor, but as the status of the Codes is now before the Court for adjudication, this issue should be determined by the Court.

Petition in the original jurisdiction of the Court by H. G. Bates *et al.*, for injunction against the Board of County Commissioners of Richland county.

Messrs. DeBruhl & McLaughlin, for petitioners.

Messrs Clarkson & Clarkson and Melton & Belser,
contra.

September 24, 1913.

MR. JUSTICE FRASER. This is a proceeding in the original jurisdiction of this Court to enjoin the county authorities of Richland county from using the chain gang of Richland county in the construction of a highway within what was formerly the town of Shandon, now a part of the city of Columbia.

There are several questions involved in the hearing on the merits, but one is sufficient for the purposes of this motion.

It is conceded by the county authorities that the road is being built under contractors. The county is to prepare the road for a top covering of bitulithic covering and the bitulithic covering is to be put on by the employees of the contractors. It is further conceded that the chain gang is kept only from a half to a block in advance of the contractors' employees.

The Code of 1912, section 957, contains this proviso: "Provided that said chain gang shall not be worked in connection with or near *any road contractor* or overseer."

The Century Dictionary defines "connection:."

1. "The state of being connected or joined; union by junction, by an intervening substance or medium, by dependence or relation or by order in a series."

Where one is laying the substructure and the other the superstructure, the parties are working in connection with each other. On the face of the statute it appears to be for-

bidden. The effect of the several statutes on each other can not be settled until the exact status of the Codes under the Constitution is determined. That question is now before the Supreme Court and ought not to be decided by one member. On the face of this statute, the collaboration of the chain gang and the employers of a contractor is forbidden, and the respondents ought not to proceed in this way until the question can be heard by the full Court.

It is, therefore, ordered, that the respondents be, and they are hereby enjoined from using the chain gang in connection with the employees of the contractors in the building and construction of the road mentioned in the petition herein, until the hearing of the proceeding in open Court and the determination thereof by its judgment herein.

8655

SOUTHERN POWER CO. v. CASSELS.

1. PLEADINGS.—Under a denial of an allegation in the complaint of a deficiency of acreage in a tract of land sold by the acre the defendant may prove the survey under which plaintiff claims the deficiency was incorrect.
2. REAL PROPERTY — BOUNDARIES — STREAMS. — Where a non-navigable stream is a boundary of a tract of land the middle of the stream is the line and to ascertain the number of acres in the tract the survey should go to the middle of the stream.
3. IBID.—IBID.—WAIVER.—Where the owner and vendor of a tract of land is present at one survey which did not include the stream to the middle, he cannot be said to have waived his right to insist that the resurvey should have gone to the middle of the stream, especially when he insisted that should have been done when he heard of the claim of shortage.
4. IBID.—BURDEN OF PROOF.—It is incumbent on the plaintiff to show by the preponderance of the evidence that the shortage he claims in the acreage of a tract of land would not be made up by including the land under the water to the middle of the boundary stream in a suit for deficiency.

Before ERNEST MOORE, special Judge, Fairfield, September, 1910. Affirmed.

Action by Southern Power Company against B. F. Cas-
sels. Plaintiff appeals.

So much of the Circuit order as the exception refers to is:

"With reference to the sixth ground of the motion, it is to be noted that the burden of proof was upon the plaintiff in this case to establish his right to recover by proving by a preponderance of the evidence that there was a deficiency in the number of acres for which payment had been made, and thus to show that plaintiff had paid money by mistake to defendant, as alleged in the complaint and denied in the answer. It was not incumbent upon the defendant to show that the tract did contain the number of acres shown by the survey of the 21st of April, 1909, but the burden of proof was upon the plaintiff to establish a right to recover money alleged to have been paid by mistake by showing that there was a deficiency in the acreage of the tract as alleged, that is to say, that plaintiff had paid for more acres than the tract in fact contained. Upon this point, while there was some testimony tending to establish a deficiency in the acreage of the tract by disregarding those portions thereof covered by the waters of the river (and possibly also other streams) and by omitting such part thereof as was covered by the road, yet there was no satisfactory evidence as to the amount of land in the tract covered by the river, nor as to the amount covered by the road.

"Such being the testimony, I am unable to say that it was made affirmatively to appear by the preponderance of the evidence that the plaintiff did pay money by mistake to the defendant. The same surveyor who, by his plat of April 21, 1909, forming a part of the deed here in question, found the tract to contain 832½ acres, finds now by a plat of June 16, 1909, made by him, that this tract contains

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740 9-10 acres. The evidence tended to show that, in this last survey, the lands under the bed of the river and under the road were not even estimated, and, as the testimony is now recalled, there was no satisfactory evidence as to how much land was covered by the river and the road.

"Under these circumstances, it cannot be said that the plaintiff established affirmatively and satisfactorily, by a preponderance of the evidence, that there was any deficiency in the acreage of the tract as conveyed. The question as to whether or not there was such a deficiency was one primarily for determination by the jury and that question was fairly submitted upon all the evidence and after full argument. The members of the jury were probably better judges of the accuracy and credibility of the witnesses testifying upon the question of the acreage than was the writer of this opinion, since those witnesses were entirely unknown to the latter, and, therefore, I cannot say that the jury was in error in reaching the verdict which was rendered.

"For these reasons the motion for a new trial must be overruled and refused, and it is accordingly so ordered."

Messrs. Osborne, Lucas & Cocke and McDonald & McDonald, for appellant.

Messrs. McDonald & McDonald cite: *Scope and effect of a general denial*: 68 S. C. 1078; 84 S. C. 117; Pom. Rem., secs. 673, 484, 563, 567, 549, 515; 8 S. C. 258; 27 S. C. 621; 58 S. C. 32; 66 S. C. 138; 81 S. C. 461. *Unless specified in the deed the land to the middle of the stream is granted as a mere incident to it*: McM. 294; 5 Rich. Eq. 76; 27 Am. St. R. 56; 65 Wis. 610; 47 Am. St. R. 516; 43 Id. 285; 52 Id. 380; 9 N. H. 461; 13 Wis. 692; 42 Wis. 248; 28 Vt. 257; 13 Me. 201; 42 Me. 209; 62 Me. 38; 48 N. Y. Eq. 42; 65 Mich. 48; 12 Ind. 51; 108 Col. 179; 37 L. R. A. (N. S.) 307; 24 Id. 1240; 27 S. C. 137.

Messrs Jas. W. Hanahan and McCants & McCants,
contra.

Mr. Hanahan cites: Under general denial defendant may show resurvey did not include entire acreage: 10 S. C. 436; 50 S. C. 53; 73 S. C. 510. The land to the middle of the stream is included in the acreage: Lord Hale, DeJuri Maris, chap. 1, chap. 3; 6 Cow. 998; 42 L. R. A. 161; 9 Cush. 496; 4 Rich. 68; 1 McC. 583; 5 Rich. Eq. 76; 1 McC. 86; 27 S. C. 146; 22 S. C. 50; Coke Bulletin 121; 14 Fed. 378; 9 S. W. 765; 41 L. R. A. (N. S.) 103; 10 Pet. 52; 140 U. S. 314.

September 26, 1913. The opinion of the Court was delivered by

MR. JUSTICE WATTS. This was an action, tried before special Judge Ernest Moore, and a jury, at the September term of Court, for Fairfield county. It was for an alleged deficiency of \$1,692, overpaid in the purchase of a tract of land purchased by the plaintiff-appellant from the defendant-respondent. The jury found for the defendant, a motion for a new trial was duly made and refused, and plaintiff appeals and by six exceptions challenges the correctness of his Honor's ruling. By the first three he complains of error on the part of his Honor in his charge to the jury, and by the fourth exception he complains of error on the part of his Honor in not charging defendant's request as to the law of waiver, and by his fifth and sixth exceptions complains of error in not granting a new trial on the grounds set out in the motion for new trial.

The appellant contends that the defendant should have answered by way of counterclaim, or set up by way of new matter, the fact that the resurvey, by which the alleged deficiency was ascertained, was partial or incom-

1 plete, before he could offer evidence, challenging the correctness of the survey. Plaintiff by com-

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plaint alleged that the number of acres paid for was not in the tract purchased, that it paid for $832\frac{1}{2}$ acres, whereas there was only $738\frac{1}{2}$, a deficiency of ninety-four acres. This was denied by the defendant, and defendant by his second defense alleged that there was no deficiency, but all the land he conveyed, to wit: $832\frac{1}{2}$ acres, was there and there was no deficiency. Under the issuable facts as made by the pleadings the defendant could offer testimony to show there was no deficiency. The defendant asked for no judgment against the plaintiff, he had no counterclaim, he, by answer, denied the allegations of plaintiff's complaint as to deficiency and set up, as a special defense, that within the boundaries conveyed there was $832\frac{1}{2}$ acres, and plaintiff, having alleged there was a deficiency of ninety-four acres within the boundaries conveyed, the burden was on it to show the deficiency. In showing this it should have had all of the boundaries

2 resurveyed, not part. It comes into Court with a partial survey of the lands purchased. It is admitted that Wateree River at this point is a *non-navigable* stream, the appellant by its deed from the respondent owns to the middle of stream, and in the resurvey the land covered by this stream is not included in the resurvey, the appellant claims a deficiency, has a resurvey, and does not include in that resurvey all of the land that it purchased and is entitled to possess. We think his Honor clearly was right in his construction of the pleadings, and in his charge to the jury in the matters complained of and made by these exceptions. *Long v. Ry. Co.*, 50 S. C. 53, 27 S. E. 531; *Latimer v. Cotton Mills*, 66 S. C. 139, 44 S. E. 559; *Hutchings v. Manufacturing Co.*, 68 S. C. 514, 47 S. E. 710. These exceptions are overruled.

The fourth exception complains of error on the part of his Honor in not charging the plaintiff's request as to the law of waiver, etc. There was an agreement to sell, first

in writing, and later, a deed of conveyance, made
3 in pursuance of this agreement. Both the agreement to sell and the deed of conveyance contain the same description and boundaries, these agreements and deeds speak for themselves, and an examination of what his Honor said when the request was made of him to charge the jury by the appellant, convinces us that he was not in error, and did or said nothing that was prejudicial to the appellant. The defendant was present and assisted at first survey, he was not present at the resurvey. He had a right to assume that the surveyor knew his business, and would include the whole tract and everything in the metes and bounds set out in the deed of conveyance, made by him to the appellant. There was nothing on his part to show an intentional relinquishment of a known right, or such conduct on his part as to warrant such an inference. That the land was not included in the survey that was under the water of the river was the act of the surveyor, and not his act. When defendant was notified that survey was unsatisfactory, he insisted that this stream be surveyed and included. This, the appellant has not done, but is now in Court, claiming a deficiency, and does not have all that it is entitled to surveyed, and give to the Court the exact deficiency, if any, although it was in its power to do so. There is no doubt that Cassels, when he conveyed, owned the land to the middle of the stream. This doctrine is fully recognized in *Shands v. Triplett*, 5 Rich. Eq. 76; *Noble v. Cunningham*, McM. Eq. 294; *State v. Bridge Co.*, 27 S. C. 137, 3 S. E. 55; *McDaniel v. Power Co.*, ante 258. This exception is overruled.

The fifth and sixth exceptions, which complain of
4 error in not granting a new trial, are overruled for the satisfactory reasons set out by the Circuit Judge in his order refusing same.

Judgment affirmed.

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MILLER v. ATLANTIC COAST LINE R. R. CO.

1. **NEW TRIALS—APPEAL.**—The discretion vested in the Circuit Court in deciding motions for new trials is not absolute or arbitrary but judicial and must be exercised on legal grounds. This Court will correct any manifest error in the exercise of such discretion.
2. **IBID.**—While this Court has no jurisdiction to review orders in motions for new trials where they are based upon or involve issues of fact, yet when no ground is given in the order and the record shows any ground on which it can be based this Court will assume it was rested on such ground. Here the refusal of the motion is held to have been rested on issues of fact. Whether the evidence claimed to be “after discovered” was “after thought of” and whether it would lead any reasonable mind to conclude it would probably change the result.

Motion by plaintiff to dismiss defendant's appeal from order refusing new trial.

Messrs. Best & Cunningham, L. D. Jennings and John F. Clifton, for the motion.

Messrs. P. A. Willcox, Purdy & Bland, Mark Reynolds and Lucian W. McLemore, contra.

September 29, 1913. The opinion of the Court was delivered by

MR. JUSTICE HYDRICK. This is the third appeal in this case. The action was begun in September, 1910, to recover damages for personal injuries sustained by plaintiff on October 18, 1909, while in defendant's service as a locomotive engineer. The first trial was had at the November term, 1910, of the Circuit Court for Sumter, and resulted in a judgment for defendant, by direction of the Court. The opinion of this Court, reversing that judgment, was handed down on December 21, 1911. 90 S. C. 249. The second trial was had at the March term, 1912, and plaintiff obtained

a verdict and judgment for \$35,000, which was affirmed by this Court, in an opinion filed April 30, 1913. 94 S. C. 388. While the last appeal was pending in this Court, the defendant moved the Circuit Court, at the March term, 1913, for a new trial, on the ground of after-discovered evidence. The Court refused the motion, in a short order, without assigning any reasons therefor. This appeal is from that order.

After the return had been filed in this Court, plaintiff moved to dismiss the appeal on the grounds (1)

1 that the order is not appealable, because the refusal of the motion was discretionary; and (2) because the appeal was taken merely for delay.

While it is true that motions for new trials are addressed to the discretion of the Court, yet the discretion is not absolute or arbitrary, but judicial. Its exercise must, therefore, be predicated upon legal grounds. And, while this Court will not substitute its discretion for that of the Circuit Court, it will correct any manifest error in the exercise of the discretion vested in that Court.

An order granting or refusing a new trial is expressly made appealable in section 11 (D), subdivision 2, of the Code of Procedure. But the right of appeal must necessarily be limited to such orders as this Court has jurisdiction to review.

We have held in cases too numerous to mention that, under the constitutional limitation of the power of this Court to the correction of errors of law, in law cases, such as this is, we have no jurisdiction to review orders

2 granting or refusing new trials, when they are based upon or involve the decision of questions of fact, unless it appears that the finding is wholly unsupported by evidence, or the conclusion reached was influenced or controlled by some error of law.

The order of the Circuit Court in this case does not disclose the grounds upon which it was decided. We have no way of ascertaining, therefore, whether it was based solely

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upon findings of fact, or whether any error of law influenced or controlled the decision. However, it must be presumed to be correct; and, therefore, if the record presents any grounds upon which the motion could have been properly refused, we must assume that the Court rested its decision upon those grounds. *Stanford v. Cudd*, 93 S. C. 367, 76 S. E. 986. And, if those grounds necessarily involve the decision of disputed questions of fact, it follows that we are without power to review the order.

It becomes necessary, therefore, to state briefly the facts and circumstances upon which the motion was decided.

On both trials in the Circuit Court, the plaintiff's physical condition and the cause of it were contested issues of fact, upon which a great deal of expert medical testimony was taken. Plaintiff's testimony tended to prove that his nervous system was seriously and permanently impaired as the result of his injury. Defendant's testimony tended to show that his condition was not so serious as he contended; but, if it was, that it was due to constitutional causes, and not to his injury.

After the second trial, defendant employed two men, named Stender and Primrose, to watch plaintiff's movements to see whether they were compatible with the existence of the condition of himself which he and his witnesses had testified to. These men had plaintiff under observation from December 29, 1912, until a short time before the hearing of the motion for a new trial, some time in March, 1913. They testified that, during that time, he walked normally and naturally, and went about the streets as other men; that, on several occasions, he got on and off street cars, while in motion, with the apparent agility of the ordinary man. Some of the medical experts who had testified for the defendant at the trial, testified, on this motion, that, after careful review and consideration of all the evidence introduced at the trial, the plaintiff's activity, as testified to by Stender and Primrose, was incompatible with the physical

condition attributed to him at the time of the trial, by plaintiff himself and his witnesses; and that such condition either did not then exist, or, if it did, that he had had a complete recovery, which his experts thought would be impossible. This is the substance of the testimony relied on in support of the motion.

On the other hand, plaintiff reaffirmed the truth of his former testimony, and said that he was as bad off as ever, and denied the truth of the testimony of Stender and Primrose and introduced testimony impeaching their credibility. A number of the medical experts who had testified in his favor at the trial, testified, on the hearing of this motion, that they had examined him only a short while before the hearing, and that his condition had not improved since the trial. Some of them said that his condition then and at the time of the trial, as testified to by him and them, was not incompatible with the activity on his part testified to by Stender and Primrose; because, they said, he could have acted as stated by them by overtaxing his strength and nervous energy, but that he would have suffered the consequences.

The foregoing history of the case and statement of the evidence adduced at the trial and upon the hearing of the motion show that there was ample ground for dispute in the testimony upon at least two vital questions which involved the decision of questions of fact: 1. Whether the evidence relied upon by defendant, in support of the motion, was "after-discovered," in the legal sense of that word, or was only such as might be more correctly designated "after-thought-of" or "after-procured," and whether, by the exercise of reasonable diligence, evidence of the same kind (except, of course, the element of plaintiff's conduct after the trial and after he had won his case, and the effect which that might have had upon his mind and conduct) could not have been procured before and in time for the trial. 2. Whether the evidence was of such character that it must

necessarily have led any reasonable mind to the conclusion that, if it had been adduced at the trial, the result would probably have been different. The decision of either of those questions adversely to appellant would have been fatal to the motion. Both involved questions of fact, as the Court has decided in several cases. See *State v. Jones*, 89 S. C. 52, and cases cited. In *State v. Bradford*, 87 S. C. 548, 70 S. E. 308, the defendant having been sentenced to life imprisonment, moved for a new trial on after-discovered evidence, and his motion was refused. On appeal, this Court said: "We are deeply impressed with the force of the affidavits made on these and other points on behalf of the defendant. Yet, it cannot be doubted that some of the affidavits are cumulative, and that if the statements contained in all of them had been admitted in evidence at the trial, there would have remained a sharp issue of fact which might have been decided for or against the defendant according to the view taken by the jury of the credibility of the witnesses. It cannot be said, therefore, that the affidavits must necessarily lead any reasonable mind to the inference that the newly-discovered evidence would probably change the result. Nothing short of this would justify the conclusion that the Circuit Court abused its discretion in refusing the motion. This being so, the law does not allow this Court to reverse the decision of the Circuit Court that a new trial should not be granted. In the recent case of *Mills v. A. C. L. R. Co.*, 87 S. C. 152, 69 S. E. 97, it is said: 'The rule is well settled that a motion for a new trial on after-discovered evidence is addressed to the discretion of the Circuit Court, and the refusal of such motion will not be reviewed, unless it appears that there was abuse of discretion, or that the exercise of discretion was controlled by some error of law. *State v. David*, 14 S. C. 432; *State v. Workman*, 15 S. C. 547; *Sams v. Hoover*, 33 S. C. 404, 12 S. E. 8; *Seegers v. McCreery*, 41 S. C. 549, 19 S. E. 696; *Peebles v. Werner & Co.*, 51 S. C. 405, 29 S. E. 2.

Such a motion must generally depend on matters of fact, over which this Court has no jurisdiction in actions at law.' "

From what we have said, it follows that this Court has no jurisdiction to review the order appealed from. This conclusion makes unnecessary the consideration of the second ground of the motion to dismiss the appeal.

Appeal dismissed.

8658

STATE EX REL. SIMS v. McMASTER, INSURANCE COMMISSIONER.

MANDAMUS—FOREIGN INSURANCE COS.—There being no abuse of discretion on the part of the Insurance Commissioner in refusing to revoke the license of a foreign insurance company, or that it was capriciously or arbitrarily exercised on a rule to show why license should not be revoked for removing a case against it from the State into the Federal Court, the plaintiff in that case has no right to mandamus to require the commissioner to revoke the license as he shows no injury from refusal to revoke.

Motion by plaintiff to reinstate his appeal, dismissed by the Court for failure to appear and prosecute.

Messrs. Gwynn & Hannon, for the motion. *Messrs. Mordecai & Gadsden, Rutledge & Hagood*, contra.

September 30, 1913.

PER CURIAM. Sections 2669, 2670, and 2671 of the Civil Code of 1912 provide that it shall be a condition precedent to the right of any foreign corporation to do business in this State that all actions arising out of the business of such corporations with the citizens of this State shall be tried in the State Courts; and that it shall be deemed an essential part of all contracts between such corporations and

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the citizens of the State that actions arising thereout or pertaining thereto shall be tried in the State Courts, which shall have exclusive jurisdiction of all such actions brought therein, saving the right of appeal to the Supreme Court of the United States. Other sections of the Civil Code prohibit foreign insurance companies from doing business in the State without a license from the Insurance Commissioner; and section 2700 provides that, besides other contingencies therein mentioned, if the commissioner shall find that any such company has violated the law of the State, "he shall revoke or suspend" its license, and prohibits the doing of business thereafter by such company, until its authority to do business is restored by the commissioner.

In June, 1912, the relator, T. P. Sims, commenced an action in the Court of Common Pleas for Spartanburg county against the respondent, The Mutual Life Insurance Company of New York, on a cause of action arising out of a transaction with said company. On petition and motion of the company, the cause was duly and regularly removed to the Federal Court. Thereafter, at the instance of the relator, the respondent, F. H. McMaster, the Insurance Commissioner of the State, cited the company to show cause before him why its license to do business in the State should not be revoked, because of its violation of the provisions of the statutes above mentioned in removing said cause to the Federal Court. For cause, the company showed that the case had been removed in consequence of its general policy and custom in such cases, and without any intention to violate the law of the State, and offered to do all that it could to have it restored to the dockets of the State Court for trial, agreeing that, if the plaintiff would move to dismiss the action in the Federal Court, it would consent thereto, and it would have its attorneys accept service of the same summons and complaint upon which the action had been originally brought, and pay all costs and expenses to which the plaintiff therein (the relator herein) had been put by

reason of the removal, except the fees of his attorneys. Upon this showing, the commissioner refused to revoke the company's license.

Thereupon, the relator instituted this proceeding to obtain a writ of mandamus to compel the commissioner to revoke the license. Upon the petition, a rule to show cause was issued, and the matter was heard by the Chief Justice, at chambers. Upon hearing the returns, he held that the revocation of the license was in the discretion of the commissioner, and that he had not abused his discretion or exercised it capriciously or arbitrarily, and, further, that the relator had shown no interest which had been prejudiced by the action of the commissioner. He, therefore, dismissed the petition. The relator appealed.

The respondent, The Mutual Life Insurance Company of New York, moved, on due notice, to dismiss the appeal, on the ground, among others, that the relator had no right to prosecute it, since no right of his was prejudiced by the action of the commissioner. Upon the day set for the hearing of the motion, no one appeared to resist it, and, on motion of respondent's attorneys, the Court passed an order dismissing the appeal, on the ground that the said T. P. Sims had not offered to show that he had any right to prosecute it.

Thereafter, on notice and affidavits, excusing their default, the attorneys for T. P. Sims moved the Court to reinstate the appeal. At the hearing of this motion, it was agreed by counsel that the Court should consider, along with the motion to reinstate the appeal, the original motion to dismiss it,—the practical effect of which is that, if the Court shall conclude that the appeal was properly dismissed, the motion to reinstate must be refused.

After careful consideration of the matter, we are of the opinion that no right of the relator, T. P. Sims, was prejudiced by the action of the commissioner; and, therefore, he has no right to prosecute this appeal. We fail to see how he would be benefited by the revocation of the company's

license. The commissioner properly took into consideration, in exercising his discretion, not only that the revocation of the license, under the circumstances, would not benefit the relator, but that it would do positive injury to the company, to the State, in the loss of revenue, and to many citizens of the State, who are agents of the company, and to many others, who are policyholders therein.

The citation of the company to appear before the commissioner to show cause why its license should not be revoked had the effect of bringing the company to a realization of its duty, under the law, to submit to the jurisdiction of the State Court, and it offered and agreed to do all that was in its power which the relator could have reasonably asked or required it to do to restore the case to the jurisdiction of the State Court. We are unable to see wherein the relator has any further interest in the matter, except, perhaps, to indulge a desire to punish the company; but the legislature has not seen fit to confer upon private individuals the power to punish in such cases.

The motion to reinstate the appeal is, therefore, refused.

The Chief Justice disqualified.

8659

BETHEA v. ALLEN.

1. FOREIGN LAWS.—There being nothing in this case making the law of other jurisdictions germane to the issues and no proof of such laws, it was proper to refuse a request as to the effect of statutes of other jurisdictions relating to conflicting conveyances.
2. REAL PROPERTY—COMMON SOURCE.—When both parties claim land from a common source, the defendant cannot take advantage of any defect in title in the common source.
3. ADVERSE POSSESSION.—The instruction as to adverse possession under the proof and admitted facts was wholly in favor of appellant.

4. **LIMITATION OF ACTIONS.**—Under a devise to A and B and in case A and B die, leaving no children, then over, the statute of limitations does not begin to run against remaindermen until the death of A and B.
5. **MORTGAGES.**—Where one having a life estate in land gives a mortgage thereon which is marked paid in full by mortgagor and turned over to him for his benefit, those claiming title through the mortgagor cannot insist that the life tenant was in possession as mortgagee.

Before C. J. RAMAGE, special Judge, Dillon. Reversed.

Action by B. P. Bethea *et al.* against J. Furman Allen *et al.* Plaintiff appeals.

Mr. P. B. Sellers, for appellant, cites: *As to delivery of deed*: 2 Hill Ch. 600, 629; 4 McC. 198; Bail. Eq. 141; 2 Speer 75; 9 Rich. Eq. 303; 10 Rich. Eq. 212. *Effect of registration and probate*: Rice Eq. 243. *Adverse possession*: McM. Eq. 157. *Estoppel by recitals in deed*: 1 McC. 85. *One holding under deed cannot deny its validity*: 16 Cyc. 706; 75 Tex. 506. *Duty of mortgagee in possession*: 27 Cyc. 1237; 24 Minn. 221.

Mr. W. F. Stevenson, contra, cites: *Recording mortgages*: 87 S. C. 120. *Delivery of deed must be proved*: 44 S. C. 372; 26 S. C. 165. *Mortgagee in possession acquires title*: 12 S. C. 24; 26 S. C. 404; 37 S. C. 317; *Scates v. Henderson*, 44 S. C.; 26 S. C. 165; 34 S. C. 371.

September 30, 1913. The opinion of the Court was delivered by

MR. JUSTICE FRASER. Parker Bethea and his wife died leaving a large tract of land. In the division among their children lot No. 4 was set aside to Elizabeth Henderson, a daughter. Elizabeth had no children and lived with her two sisters, Laura Jane Bethea and Maria L. Bethea, in the

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family home on lot No. 4. On the 6th day of January, 1871, Elizabeth signed the following paper :

“State of South Carolina, County of Marion.

Know all men by these presents that I, Elizabeth E. Henderson, for and in consideration of the natural love (*sic*) and affection I bear to my two sisters, Laura Jane Bethea and Maria L. Bethea, I give at my decease all the real and personal property that came to me from the estate of the late Parker Bethea and Elizabeth Bethea, his wife, and in case the said Laura Jane Bethea and Maria L. Bethea die leaving no children; then after paying for a set of tombstones to be put to my grave and all other debts and funeral expenses, I give the above described property to Benjamin P. Bethea, and to his children at his decease, to have and to hold, and I bind each and every one of my heirs and administrators and assigns to warrant and forever defend the same with the above described parties. Given under my hand and seal this the 6th day of January, 1871.

Witness: ELIZABETH E. HENDERSON. (Seal.)

Elmore Allen,

G. W. Miles.” .

On 26th June, 1872, the paper was probated and on 29th June, 1872, it was recorded. On the 19th of June, 1872, Elizabeth died, leaving her sisters in possession. The grantees conveyed this land by deeds that purported to carry a fee and it was bought by the respondent. Both of these sisters are now dead and Benjamin P. Bethea and others bring this suit to recover possession of the land as remaindemen.

On the 10th of April, 1872, Elizabeth executed another paper, which was construed to have been a mortgage of “all her right, title and interest” in this land. Upon this mortgage there appears the following endorsement: “The within mortgage paid in full by Laura J. Bethea and Maria L. Bethea and turned over to them for their benefit this

June 3, 1873." Laura married Allen, Maria married Harris.

The defendant denied plaintiff's title and claimed title in himself, set up the bar of the statute (ten years) and a presumption of a grant (twenty years), and claimed to be entitled to be subrogated to the rights of the mortgagee and claimed betterments. The jury found for the defendant and from the judgment entered thereon the plaintiff appealed upon six exceptions.

I. "This (*sic*) his Honor erred in refusing plaintiff's fourth request to charge as follows: 'Under the statutes of many jurisdictions superiority of title between conflicting conveyances is made to depend upon priority of

1 record. Between two deeds standing on the same footing as to recording, the older will have the preference, it being respectfully submitted that the foregoing request embodies a correct proposition of law, and that under the testimony same was applicable to this case."

This exception is overruled. There was nothing in this case which called for the charge as to the law in other jurisdictions and if there had been there was nothing in the case upon which the charge could be based. If the law in other States is germane to the issue, then these laws must be proved and there was no proof of them.

II. "That his Honor erred in charging the jury that the plaintiff must prove the delivery of the deed under which plaintiff claims by a preponderance of the testimony,

2 whereas under all the admitted facts in the case he should have charged that there was a *prima facie* showing of delivery and that it was incumbent on defendant to prove the nondelivery of said deed by a preponderance of testimony.

III. "That his Honor erred in charging the jury that plaintiff must prove delivery of the deed under which he claimed by a preponderance of the testimony, in that he should have held under all the admitted facts and circum-

stances of the case that defendant was estopped from claiming that there had been no delivery of said deed for the reason that plaintiff and defendant claimed the lands in dispute from a common source, to wit: from Elizabeth Henderson."

These exceptions are sustained for the reason that Elizabeth Henderson was the common source, as will be seen under exception V, and as the defendant claimed under this deed, he could not take advantage of a defect in the execution of it.

IV. "That his Honor erred in charging the jury the law as to adverse possession when in fact there was and could be under all the admitted facts and circumstances in the case no question of adverse possession and that such

3 a charge could only have confused the minds of the jurors to the prejudice of the plaintiff." His Honor charged as follows: "I charge you that there could be no adverse holding or possession sufficient to ripen into title by the heirs at law or grantees of Laura Allen and Maria Harris, if they died without children, even if they undertook to convey the premises in fee simple with general warranty, against Benjamin P. Bethea and his children until both Maria and Laura had been dead for ten years or more." It was undisputed that they had no children and the survivor had not been dead ten years. The charge was wholly in favor of appellant and he cannot complain. This exception is overruled.

V. "That his Honor erred in refusing plaintiff's motion for a new trial based upon the ground that the verdict of the jury was capricious and unsupported by the evidence, in that it appeared from the testimony and evidence

4 that both parties claimed from a common source, to wit: Elizabeth Henderson, and that defendant's predecessors in title had only a life estate, with remainder over to the plaintiffs and that such life estate had terminated,

thus terminating the right of defendant to the possession of the premises in question."

This exception must be sustained. In the case of *Kilgore v. Kirkland*, 69 S. C. 84, we find the following: "In *Smythe v. Tolbert*, 22 S. C. 133, the Court says: 'There is no doubt that as a general rule the plaintiff in an action to recover possession of real estate on the ground of title must show a complete and perfect title in himself, going back to a grant, either actual or presumed.' To this rule, however, there are several exceptions, one of which is where both parties claim from a common source; and having done so, the question is, which of the two has the superior title * * * Whether, then, the general rule or the exceptions is to govern, in any special case, must depend upon the fact whether or not the parties claim through a common source. If they do not, then the plaintiff must recover upon the strength of his own title, and not upon the weakness of that of his adversary, and must trace back to a grant; if they do, then the plaintiff may stop, in the first instance, at the title of the common grantor; and whether they thus claim or not is a question of fact (unless admitted in the pleadings) for the jury upon the evidence." In this case the plaintiff claimed directly under the Elizabeth Henderson deed. He produced successive conveyances from the grantees under that and to the defendant. Plaintiff had thereby made out a *prima facie* case. The defendant had the right to show that he did not claim under the Henderson deed or that he had an independent source of title. He made no such proof, but, on the contrary, the following appears in the case:—

"Q. Since the death of Mrs. Henderson, those under whom you claim, and you have used it and claimed the whole of that land as your own land? A. Yes, sir."

There was undisputed evidence that the successive grantors in defendant's chain of title had been in possession. There was therefore no evidence from which the jury could infer that the defendant did not claim under the Henderson deed.

Inasmuch as the defendant did claim under the Henderson deed, there could be no adverse holding until the death of Mrs. Laura Allen and Mrs. Maria Harris, and the survivor died in 1909. The limitations were therefore unavailing.

VI. "Because his Honor erred in not charging the jury as requested by plaintiff that the only effect of the mortgage on the land in dispute admittedly given by Laura Bethea and Maria Bethea to Joel Allen soon after the death

5 of Elizabeth Henderson, and its so-called assignment to them by Joel Allen when paid, was to make the mortgagees in possession for the purpose of applying the rents and profits of the land to payment of the mortgage, and that such possession could never ripen into title as against the claim of title by the plaintiff and his children under the deed of Elizabeth Henderson in question in this case."

The mortgage was marked paid and there is no evidence that it was not paid. This exception is overruled.

The judgment appealed from is reversed and the case remanded for a new trial as to Benjamin F. Bethea, who alone appeals.

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DEAVER-JETER CO. v. SOUTHERN RY.

1. CARRIER—FREIGHT.—THE CARMACK AMENDMENT does not relieve the terminal carrier of an interstate shipment of liability for damage or loss on its line.
2. IBID.—IBID.—ACTION.—The party to whom goods are sold, in whose name the B/L is made out and to whom it was sent, is the proper person to sue for damages or loss of goods by carrier. That the seller indemnified the buyer against the costs and expenses of the suit does not alter the right.
3. IBID.—ACT OF GOD.—THE BURDEN is on the carrier to show goods were destroyed by act of God and that it exercised due care to prevent the consequences. The Courts of this State do not follow the Federal rule as to the burden of proof in such cases.

Before F. B. GARY, J., Union, Fall term, 1912. Affirmed.

Action by Deaver-Jeter Co. against Southern Railway Co.
Defendant appeals.

Messrs. Sanders & DePass, for appellant, cite: *The State Courts have no authority to try this case*: 226 U. S. 491. *In this case the Federal rule of proof of loss by act of God should apply*: 10 Wall. 176.

Mr. Jno. K. Hambling, contra, cites: *The plaintiff is the proper party to bring this action*: 91 S. C. 503. *The Carmack amendment does not apply to this case*: 88 S. C. 365; 91 S. C. 379; 56 U. S. 516. *Burden of proof of loss by act of God is on carrier*: 91 S. C. 61; 80 S. C. 210; 65 S. C. 509.

October 1, 1913. The opinion of the Court was delivered by

MR. JUSTICE HYDRICK. In August, 1908, the Fecheimer-Keifer Company, of Cincinnati, Ohio, sold plaintiff a bill of goods and delivered them to the Louisville and Nashville Railroad Company for transportation and delivery to plaintiff, at Carlisle, S. C. The goods were destroyed at Hamberg, S. C., while in defendant's possession. Defendant denied liability for the loss on the ground that it was caused by the act of God, to wit: an unprecedented flood in the Savannah River. Under the instructions of the Court, the verdict established the fact that the flood was not the sole cause of the loss, but that the goods could have been saved by the exercise of due care, after the defendant knew, or should have known, that they were in peril.

Appellant's first contention is that the Circuit Court had no jurisdiction of the action, because the shipment was interstate, and, therefore, under what is known as the Carmack

amendment to the act of Congress, regulating interstate commerce, only the initial carrier is liable for the loss, and, of course, that carrier can be sued only in the Courts of the State of its legal residence. We have recently decided that contention adversely to appellant's view in the case of *Varnville Furniture Company v. C. & W. C. Ry. Co.*, MSS.

The next question is: Is the plaintiff the real party in interest, and entitled to maintain this action? There is no doubt of it. The testimony is that the goods were sold to the plaintiff and delivered to the initial carrier for the plaintiff, and the bill of lading was sent to the plaintiff. The general rule is that, in such circumstances, in the absence of an intention or agreement, expressed or implied, to the contrary, the title is in the consignee. 35 Cyc. 317, 4 A. & E. Enc. L. (2d) 525. In so far as the agreement of the Fechheimer-Keifer Company to save the plaintiff harmless from the costs and expenses of the action is relied upon by the defendant to sustain this objection, it is concluded by the decision on the former appeal in this case. 91 S. C. 503, 74 S. E. 1071. In so far as the testimony of the manager of the plaintiff company is relied upon for that purpose, it may be said that it was nothing more than his opinion on a question of law. The undisputed facts vested in plaintiff at least a *prima facie* title to the goods, and the right to maintain the action. There was no direct evidence that the sale had ever been rescinded. Even if it can properly be said that there was any conflict in the evidence, the question was submitted to the jury and resolved in plaintiff's favor.

There was no error in the instruction that the burden was upon defendant to prove that the goods were destroyed by the act of God, and that it had exercised due care to prevent the consequences of the act of God. Appellant cites

3 and relies upon the case of *Railway Co. v. Reeves*, 10 Wall. 176, 19 L. Ed. 909, for the proposition that

when a carrier shows that a loss was caused by an act of God, as by flood, he is excused, without proving affirmatively that he was guilty of no negligence, and contends that, as this was an interstate shipment the law as declared by the Federal Supreme Court must be applied to the case. We cannot sustain that contention. The cause of action is not created or given by any Federal statute. It is an action given by the common law, and it is, therefore, subject to the same rules of law and evidence as any other common law action. *Aldrich v. R. Co.*, ante 427, and cases cited. If the question were an open one, the case cited by appellant would be of very high persuasive authority, but as no Federal question is involved, it would not be of controlling authority, and as the question has been frequently decided otherwise in this Court, we feel bound to follow our own decisions. In *Ferguson v. Ry.*, 91 S. C. 61, 74 S. E. 129, the rule as stated in *Slater v. Ry.*, 29 S. C. 96, 6 S. E. 936, was approved. In the Slater case the rule is thus stated: "Where an act of God causes injury to property in the hands of a common carrier, and such act is the sole cause of such injury, then the proof of this fact is a perfect shield. But if there be any negligence on the part of the carrier, which, if it had not been present, the injury would not have happened, notwithstanding the act of God, the carrier cannot escape responsibility. And the *onus* is upon the carrier to show, not only that the act of God was the cause, but that it was the entire cause; because it is only when the act of God is the *entire* cause that the carrier can be shielded."

Without attempting any detailed statement or analysis of the testimony, which can subserve no useful purpose, we think there was evidence from which a reasonable inference could have been drawn that, if defendant had exercised proper diligence after it discovered, or should have discovered, that the goods were subject to the perils of the flood, they could have been saved. There was, therefore, no error

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in submitting that issue to the jury, or in sustaining the verdict.

Judgment affirmed.

Remittitur stayed on application for writ of error to United States Supreme Court.

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RIGBY v. GAYMON.

STATUTE OF FRAUDS—CHATTEL MORTGAGES.—Where one executes to a merchant an agricultural lien and chattel mortgage to secure advances of money or goods to be used in making a crop and he informs mortgagee that he wants thereunder certain articles of more than \$50 value and the mortgagee enters them on his books, but the memorandum is not signed by the mortgagor nor goods accepted by him, the statute of frauds applies.

McNeill v. Conyers, 80 S. C., 571, distinguished from this case.

Before ERNEST GARY, J., Clarendon, February, 1913.
Reversed.

Action by J. H. Rigby against David Gaymon. Defendant appeals.

Messrs. A. Levi and Charlton DuRant, for appellant, cite: 36 S. C. 70.

Messrs. Davis & Wineberg, contra, cite: 80 S. C. 570; 57 S. C. 576.

October 6, 1913. The opinion of the Court was delivered by

MR. JUSTICE HYDRICK. This was an action of claim and delivery to recover the possession of certain chattels, which

plaintiff claimed under a chattel mortgage given him by defendant on January 19, 1911. The contract under which plaintiff claimed the right to recover was a combined agricultural lien and chattel mortgage. It was under seal, and was duly executed by both parties. It recited that Gaymon desired Rigby to make advances during the year to enable him to make a crop; that such advances were to be made from time to time during the year, and the amount and kind thereof, whether in money or supplies, or both, was to be entirely at the option of Rigby; that they should not exceed \$164.50; that the amount should become due on October 1, 1911, and that Gaymon should use them to make the crop. The instrument expressed that it was given "to secure the payment of all such sums of money" as Gaymon "may owe" Rigby "for advances made during the year under the terms set forth."

At the time the paper was executed, Gaymon owed Rigby nothing. On the day that it was executed, and after it was executed, Gaymon told Rigby he wanted three tons of guano and eight sacks of soda, of the value of \$149.50 and \$15 worth of other supplies. Rigby put this down on his books, but the entry was not signed by Gaymon. About the first of March, Rigby ordered the fertilizer shipped from Charleston to Silver, Gaymon's nearest station, in a car consigned to Rigby. For alleged reasons, which need not be mentioned, Gaymon refused to accept or receive the fertilizer, or any part thereof, and never got any supplies from Rigby at all. Under the instructions of the Court, plaintiff had a verdict and judgment for the property.

The sole question presented by the appeal is, whether plaintiff's account for the fertilizer was within the statute of frauds, which was set up as a defense. We think it was. Leaving out of consideration, for the moment, the written agreement, the contract for the sale of the fertilizer was clearly within the statute. The question for secondary consideration, then, is whether the written agreement was suffi-

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cient to take the sale out of the statute, for that is the only ground upon which it is contended that the sale is not within the statute. We do not see how the agreement can be allowed to have that effect, because the rule is well settled that a writing is not sufficient to take a sale out of the statute, unless it contains all the essential elements of the contract. *Louisville Co. v. Lorick*, 29 S. C. 533, 8 S. E. 8, 2 R. L. A. 212n. Here the writing does not specify the kind, or quality, or quantity, or the price of the advances to be made. Therefore, it was incumbent on plaintiff to prove each sale made to the defendant, under the contract. If he had advanced supplies in items under \$50 in value, he would have had to prove each item of the account according to the rules of evidence, just as if the written contract had not been made. So, when he undertook to prove the item in question, it was incumbent upon him to do so according to law and the rules of evidence; but he was met, in the attempt, by the statute, which says that, as to this item, the contract was not good, because no note or memorandum in writing of the bargain was made and signed by the party to be charged by the contract. *Smith v. Evans*, 36 S. C. 69, 15 S. E. 344.

Respondent relies upon certain remarks of the Court in *McNeill v. Conyers*, 80 S. C. 571, 61 S. E. 1068, in which plaintiff was allowed to recover property sued for under a similar contract. In that case, however, the whole amount advanced was only \$26.25, and there was no dispute as to the account, the items of which had been accepted and received by the defendant. Therefore, the application of the statute of frauds was not an issue in that case.

Reversed.

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STRICKLAND v. STRICKLAND.

1. **APPEAL.**—NOTICE of intention to appeal from judgment filed out of term time is in time when served more than ten days after filing of judgment, but before notice of such filing.
2. **JURISDICTION.**—THE MAGISTRATE court has jurisdiction of members of a partnership living in another county, if properly served, where one member of the firm lives in his county who is also properly served. That the resident in the magistrate's county has since the making of the contract sued on withdrawn from the partnership under a contract that the other members are liable for the debts, to which the plaintiff was not a party, does not oust the jurisdiction.

Before MEMMINGER, J., Colleton, July, 1912. Reversed.

Action by J. F. Strickland against Fairfax Furniture Company, in Court of magistrate J. E. Bryan. From Circuit order reversing magistrate's judgment, plaintiff appeals.

Messrs. Padgett, LeMacks & Moorer, for appellant, cite: *Defendants waived objection to jurisdiction by remaining during the trial*: 69 S. C. 278. *All parties should be sued*: 78 S. C. 302.

Mr. J. M. Patterson, contra.

October 6, 1913. The opinion of the Court was delivered by

MR. JUSTICE HYDRICK. The respondents moved to dismiss this appeal on the ground that the notice of appeal was not served within the time required by law. From the affidavits, we gather these facts: The cause was heard in term time, but the Court reserved its decision, and it was filed after the Court had adjourned for the term, on July 12, 1912. On July 23, 1912, notice of appeal was served on respondents' attorney by J. Henry Johnson, Esq., who makes

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affidavit that he delivered to him and left with him a
1 copy thereof. As the parties have ten days after the
service upon them of written notice of the filing of
orders, decrees or judgments granted or rendered at cham-
bers or filed in vacation (see Code of Procedure 1912,
sec. 384, and cases cited in the note, and *O'Rourke v. Paint
Co.*, 91 S. C. 403), and as no such notice had been given to
appellant's attorneys at that time, the service of notice of
intention to appeal on July 23 was in time, although it was
more than ten days from the filing of the judgment. This
makes it unnecessary to pass upon the validity of the service
made by the sheriff, upon which appellant also relies. The
motion to dismiss the appeal is, therefore, refused.

Plaintiff brought this action in the Court of a Magistrate
for Colleton county against the defendants named in the
caption, as partners, doing business under the name of the
Fairfax Furniture Company. At the time of the
2 commencement of the action, the defendant, W. W.
Strickland, was a resident of Colleton county. The
other defendants resided in Barnwell county. In January,
1911, when the contract sued on was made, the defendants
were all members of the firm. Thereafter, in August, 1911,
and before the commencement of the action, the defendant,
Strickland, sold his interest in the partnership to the other
defendants, who assumed the debts of the concern.

On the call of the case for trial in the magistrate's court,
the Thomas defendants interposed an objection to the juris-
diction of the Court, supported by an affidavit, on the ground
that, at the time the action was commenced, both members
of the firm were residents of Barnwell county. The magis-
trate overruled the objection, and allowed plaintiff to amend
his summons and complaint by charging the defendants as
"formerly partners," etc. The Thomas defendants then
moved to strike the name of W. W. Strickland from the
record, as a party defendant, on the ground that he was not
a member of the firm. That motion was refused.

The plaintiff proved the facts above stated. The magistrate rendered judgment against the Thomas defendants only, holding that the testimony showed that, as between them and the defendant, Strickland, they had assumed the debts of the firm. The Thomas defendants alone appealed.

The Circuit Court reversed the judgment on the ground that the magistrate in Colleton county had no jurisdiction of the defendants against whom the judgment was rendered, because they were residents of Barnwell county. The Court held that, as there were several defendants, the magistrate would have had jurisdiction, if one of the real defendants in interest had been a resident of Colleton county; but that, as the defendant, Strickland, was not a real party in interest, because the other defendants had assumed the firm debts, the Court could not acquire jurisdiction of the others by making him a party defendant.

In this, the Court erred. The assumption of the firm debts by the Thomases was an agreement only between them and the defendant, W. W. Strickland. There was no testimony that the plaintiff was a party to it, or that he acquiesced in it. Therefore, it could not have affected the liability of the defendant, Strickland, to the plaintiff. His liability to the plaintiff was fixed, when the contract was made, and nothing which the members of the firm did among themselves after that time could have affected it without his consent. Therefore, he was properly made a party defendant, and, as one of the proper parties defendant was a resident of Colleton county, the magistrate of that county had jurisdiction of all the defendants, under the authority of section 174 of the Code of Procedure of 1912, which provides that, if there is more than one defendant, the action may be tried in any county in which one or more of the defendants reside, at the time of the commencement thereof. In such cases, when the Court has properly acquired jurisdiction of the parties, the rendition of a judgment in favor

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of the party whose residence in the county of trial gave the Court jurisdiction of the other defendants could not have the effect of ousting the jurisdiction.

Reversed.

END OF THIS VOLUME.

THE STATE OF SOUTH CAROLINA.

PER CURIAM.

In the Supreme Court.

The following was adopted on January 14, 1913, to be known as Rule 29. After this date the South Carolina Equity Reports, beginning with 1 DeSaussure Equity and ending with 14 Richardson Equity, shall be numbered in the following sequence, and they may be so cited in this and the other Courts of the State:

1 DeSaussure	1 S. C. Eq.	1 Richardson	18 S. C. Eq.
2 DeSaussure	2 S. C. Eq.	2 Richardson	19 S. C. Eq.
3 DeSaussure	3 S. C. Eq.	1 Strobhart	20 S. C. Eq.
4 DeSaussure	4 S. C. Eq.	2 Strobhart	21 S. C. Eq.
Harper	5 S. C. Eq.	3 Strobhart	22 S. C. Eq.
1 McCord	6 S. C. Eq.	4 Strobhart	23 S. C. Eq.
2 McCord	7 S. C. Eq.	3 Richardson	24 S. C. Eq.
Bailey	8 S. C. Eq.	4 Richardson	25 S. C. Eq.
Richardson's Cases	9 S. C. Eq.	5 Richardson	26 S. C. Eq.
1 Hill	10 S. C. Eq.	6 Richardson	27 S. C. Eq.
2 Hill	11 S. C. Eq.	7 Richardson	28 S. C. Eq.
Riley	12 S. C. Eq.	8 Richardson	29 S. C. Eq.
Dudley	13 S. C. Eq.	9 Richardson	30 S. C. Eq.
Rice	14 S. C. Eq.	10 Richardson	31 S. C. Eq.
Cheves	15 S. C. Eq.	11 Richardson	32 S. C. Eq.
McMullen	16 S. C. Eq.	12 Richardson	33 S. C. Eq.
Speers	17 S. C. Eq.	13 Richardson	34 S. C. Eq.
		14 Richardson	35 S. C. Eq.

The South Carolina Law Reports, beginning with 1 Bay and ending with 15 Richardson, shall be numbered in the following sequence, and they may be so cited in this and the other Courts of the State:

1 Bay	1 S. C. L.	1 McMullan	26 S. C. L.
2 Bay	2 S. C. L.	2 McMullan	27 S. C. L.
1 Brevard	3 S. C. L.	1 Spears	28 S. C. L.
2 Brevard	4 S. C. L.	2 Spears	29 S. C. L.
3 Brevard	5 S. C. L.	1 Richardson	30 S. C. L.
1 Treadway	6 S. C. L.	2 Richardson	31 S. C. L.
2 Treadway	7 S. C. L.	1 Strobhart	32 S. C. L.
1 Mill (Constitutional)	8 S. C. L.	2 Strobhart	33 S. C. L.
2 Mill (Constitutional)	9 S. C. L.	3 Strobhart	34 S. C. L.
1 Nott and McCord	10 S. C. L.	4 Strobhart	35 S. C. L.
2 Nott and McCord	11 S. C. L.	5 Strobhart	36 S. C. L.
1 McCord	12 S. C. L.	3 Richardson	37 S. C. L.
2 McCord	13 S. C. L.	4 Richardson	38 S. C. L.
3 McCord	14 S. C. L.	5 Richardson	39 S. C. L.
4 McCord	15 S. C. L.	6 Richardson	40 S. C. L.
Harper	16 S. C. L.	7 Richardson	41 S. C. L.
1 Bailey	17 S. C. L.	8 Richardson	42 S. C. L.
2 Bailey	18 S. C. L.	9 Richardson	43 S. C. L.
1 Hill	19 S. C. L.	10 Richardson	44 S. C. L.
2 Hill	20 S. C. L.	11 Richardson	45 S. C. L.
3 Hill	21 S. C. L.	12 Richardson	46 S. C. L.
Riley	22 S. C. L.	13 Richardson	47 S. C. L.
Dudley	23 S. C. L.	14 Richardson	48 S. C. L.
Rice	24 S. C. L.	15 Richardson	49 S. C. L.
Cheves	25 S. C. L.		

And the official Reporter of this Court is directed to publish this order on the front pages of the next three ensuing volumes of the South Carolina Reports.

EUGENE B. GARY,
Chief Justice.

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1. Title to office should usually be determined in an action. *See Offices, 1.*

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1. Court will not require, to be made parties when no useful purpose can be thereby subserved. *Thompson v. Ass. Soc.* 16

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1. Lien of landlord on crops of servant. *See Mortgages, 1.*

ADVERSE POSSESSION.

1. An instruction that defendant must have held the land for full ten years before the commencement of this action. May 10, is not a charge on the facts. *McLain, Admr., v. Woodside,* 152
2. The instruction as to adverse possession under the proof and admitted facts was wholly in favor of apellant. *Bethea v. Allen,* 479

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1. In requisition proceedings. *See Evidence, 15.*

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1. Of landlord on crops of servant. *See Mortgages, 1.*

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1. One not registered in municipality is not qualified to hold office of alderman. *See Cities v. Towns, 2.*

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1. In absence of showing of abuse of discretion in Circuit Judge

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AMENDING PLEADINGS.

See Pleadings, 3.

ANSWER.

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APPEAL.

1. Where parol evidence has been admitted without objection to prove an original and substituted agreement for the sale of stock, an exception that it was error to admit parol evidence to vary the terms of a receipt which defendant contended a memoranda under the statute of frauds is not considered. *McLester v. Barlow,* 25
2. Where the main issue was whether there was a substitute agreement, a failure on part of the trial Judge to construe a receipt connected with the transaction is not prejudicial. *Ibid.*
3. If fraud was made an issue by the pleadings it was decided against defendant by the jury and not reviewable here. *Currence v. Sovereign Camp,* 61
4. Where an error in a charge is patent a party may lose his right to except to it on appeal by not calling the attention of the Court to it. *State v. Mattison* 101
5. Where an appeal from a magistrate Court has been on the docket in the Circuit Court for a general and special term of Court and the respondent has at each term endeavored to have it heard, the Court may on his motion dismiss the appeal at the next regular term for want of prosecution. *Lykes v. Ry.,* 111
6. In absence of showing of abuse of discretion in Circuit Judge

- allowing temporary alimony and counsel fees, appeal from such order will not be considered. *Reed v. Reed* 180
7. Errors in misstating issues not called to the attention of the Court, and instructions on issues as to which there is no evidence are not considered on appeal. *Gamble v. Ins.*, 196
8. Whether the verdict is against the overwhelming preponderance of the testimony is for the Circuit Judge. *Ibid.*
9. Where in claim and delivery a verdict is found for possession of the property, and a special finding that defendant owed plaintiff a certain amount, and upon appeal by defendant that amount is reduced more than ten dollars, he is entitled to appeal costs. *Brown & Parler v. Kolb*, 217
10. Where the record does not show the Judge was requested to instruct that there was no evidence to sustain an allegation in the complaint, his failure to do so should not be made the basis of an exception. *Hurst v. Furniture Co.*, 221
11. Where the issues referred involve title to land, findings by referee are not reviewable in this Court. *D. W. Alderman v. McKnight*, 245
12. Error in admission of evidence will not be considered where similar evidence came out without objection. *See Evidence*, 2.
13. Right of appeal from condemnation verdict. *See Condemnation*, 1, 2, 3, 4.
14. The discretion vested in the Circuit Court in deciding motions for new trial is not absolute or arbitrary but judicial and must be exercised on legal grounds. This Court will correct any manifest error in the exercise of such discretion. *Miller v. R. R. Co.*, 471
15. Notice of intention to appeal from judgment filed out of term time is in time when served more than ten days after filing of judgment, but before notice

- of such filing. *Strickland v. Strickland*, 492
16. Where findings in magistrate Court are concurred in by the Circuit Court, they are not disturbed here. *See Carrier*, 9.

ASSIGNMENT.

1. Of policy of insurance. *See Insurance*, 3.

ASSUMPTION OF RISKS.

1. Where the evidence as to contributory negligence and assumption of risks is susceptible of more than one inference, those issues should be sent to the jury. *Tucker v. Clinton Cotton Mills*, 302

ATTORNEY.

1. Waiver may be sometimes presumed from conduct; but where a nonresident by his attorneys requests service of complaint on them reserving all rights, and they serve notice of motion to strike from the complaint, which motion was abandoned, it is held the nonresident did not thereby waive the right to move to set aside the service on him in this State while attending Court to testify and assist in conducting a case in this Court as attorney for a nonresident client. *Williams v. Hatcher*, 49
2. A foreign attorney coming into this State to attend to the trial of a case here is exempt from service of process while in this State on that business. *Ibid.*
3. When attorney's fee for defendant mortgagee should not be included in judgment of foreclosure. *See Mortgages*, 4.

ATTRACTIVE NUISANCE.

See Nuisance.

BAIL.

1. The duty of the Court under writs of *habeas corpus* in extradition cases is simply to inquire if the requisitions of the Federal statutes have been met and pending that investigation bail

- should not be granted unless some departure from the Federal law has been made to appear. In such investigation the Courts of the asylum State should not inquire into the motive of the prosecution in the demanding State. *Ex parte Massee*, 815
2. Where requisition papers are regular on their face every intendment should be indulged in favor of their validity, but where the prisoner has made the *prima facie* showing that they are not regular, he may be admitted to bail pending the final hearing. *Ibid.*, 815
 3. Should bail be given in extradition proceedings without notice to the State? *Ibid.*, 815

BANKRUPTCY.

1. An insurance policy on the life of a bankrupt, which has no cash surrender value and for which the insurer would have paid no money, at the time of adjudication of bankruptcy or prior to death of insured, which occurred while settlement of the bankrupt estate was pending and before discharge, does not pass to the trustees by operation of law. *Sanders v. Etina Life Ins. Co.*, 86
2. Where in such policy the power is given the insured to change the beneficiary without consent of insurer, such power does not pass to the trustees. *Ibid.*, 36
3. Nor do the proceeds of such policy belong to the trustee because the wife was adjudged a bankrupt as a partner with the insured, where she was discharged before the death of the husband bankrupt. *Ibid.*, 36

BILL OF LADING.

See Carrier, 6.

BOND DEBT OF STATE.

1. The following principles apply to the State in refunding its outstanding bonded debt: (1) The refunding of a valid existing debt does not increase the debt

of the State, and needs not the sanction of the qualified electors which is required by section 11 of article X of the Constitution before the public debt can be increased. (2) The liability of the State upon negotiable paper, issued by competent authority, is the same as that which attaches to private individuals under like circumstances. (3) Holders of such paper in the absence of allegation to the contrary are presumed to be innocent purchasers for value before maturity and without notice of any objection to which it may be liable. (4) When authority to issue such paper exists neither irregularities nor frauds on the part of the officers or agents of the State who are entrusted with the exercise of such authority will affect it in the hands of such holders. (5) The State is estopped to deny recitals on the face of such paper in the hands of such holders. *State v. Blenae*, 408

2. The title of the joint resolution approved March 22, 1878, is sufficiently comprehensive to embrace in the body of the resolution the validation of the issuance of Green Consols by former officers of the State after their terms of office had expired. The State has the authority to authorize private individuals to issue bonds and to validate any irregularities in their issuance. *Ibid.*
3. The title of the act of 1878 is broad enough to include the refunding of obligations of the State issued after January 1, 1866. *Ibid.*
4. "Date of issue" as used in the acts of 1892 means the date which stocks and bonds bear, and does not refer to the date on which they were actually issued. *Ibid.*
5. Under the provisions of the act of 1892 the sinking fund commission should now (at the expiration of 20 years from the date of the bonds then issued) cancel the bonds and stocks bought by it. *Ibid.*

6. The act of 1896 limiting the time within which coupon bonds may be consolidated or refunded does not destroy the validity of such obligations, but only prevents the State Treasurer from refunding them after that time and the legislature by thereafter providing for refunding such obligations does not thereby increase the bonded debt of the State. *Ibid.*

BONDS.

1. Of school districts.
See School Districts 1, 2, 3, 4.

BOUNDARIES.

- See Real Property*, 8, 9, 10.

BREACH OF TRUST.

1. Grafting is a breach of trust.
See Grafting, 1.

BREACH OF WARRANTY.

1. Where an executor intends to bind himself individually, he is so liable on breach of warranty.
See Deeds, 1.

BURDEN OF PROOF.

1. Where it is shown a servant was injured because of a defective or unsafe place, the burden is then cast on the master to show he used due diligence in keeping the place reasonably safe and suitable. *Thomason v. Victor Mfg. Company*, 289
2. Defense by master of negligence of fellow servant must be proved by the preponderance of the evidence. *See Evidence*, 7.
3. In shortage in the acreage of a tract of land. *See Real Property*, 10.
4. Is on carrier to show goods were destroyed by act of God. *See Evidence*, 26.

BURGLARY.

1. Entering in the nighttime a piazza to a dwelling enclosed by a low balustrade and picket gates to keep out dogs and chickens, there being no evidence of intent to steal, is not such an

entry as will support an indictment for burglary at common law. *State v. Puckett*, 114

CAPITAL PUNISHMENT.

1. The act 27 Stat. 1912, substituting electrocution for hanging, is not an *ex post facto* law when applied to the punishment of a crime committed before its enactment.
State v. Vaughn, 455
State v. Malloy, 441

CARMACK AMENDMENT.

1. The Carmack amendment does not relieve the terminal carrier of an interstate shipment of liability for damage or loss on its line. *Deaver-Jeter Co. v. Ry.*, 485

CARRIER.

1. An error in quoting interstate rates which has been filed with the interstate commission and published should not prevent a carrier from collecting the rate fixed by the commission. *Aldrich v. Sou. Ry. Co.*, 427
2. Where a carrier refuses to transport freight except upon an unlawful rate, it is liable to the shipper for damages. *Ibid.*
3. Loading cotton seed into cars at carrier's station furnished by it at the shipper's request is sufficient to warrant the inference of tender for shipment, and the quoting by carrier of an unlawful rate is sufficient to justify the inference of a refusal to ship except upon payment of such lawful rate. *Ibid.*
4. The Court of Common Pleas has jurisdiction of an action to recover damages for overcharges for an interstate shipment. *Ibid.*
5. The Carmack amendment does not relieve the terminal carrier of an interstate shipment of liability for damage or loss on its line. *Deaver-Jeter Co. v. Sou. Ry.*, 485
6. The party to whom goods are sold, in whose name the B/L is made out and to whom it was sent, is the proper person to sue for damages or loss of goods by

carrier. That the seller indemnified the buyer against the costs and expenses of the suit does not alter the right. *Ibid.*

7. The burden is on the carrier to show goods were destroyed by act of God and that it exercised due care to prevent the consequences. The Courts of this State do not follow the Federal rules as to the burden of proof in such cases. *Ibid.*
8. Damages for overcharge in freight rates. *See Damages*, 6, 7.
9. There being evidence in the magistrate Court to support the findings that a carrier unlawfully withheld from consignee a shipment and charged thereon unlawful storage, which findings were concurred in by the Circuit Court, the judgment below will not be disturbed. *Owens v. Ry.*, 487

CASES DISTINGUISHED.

1. *Brown v. Miller Lumber Co.*, 83 S. C. 221, from *Granite Brick Co. v. Titus*, 47.
2. *Drawdy v. Ry.*, 78 S. C. 375, from *Mims v. R. R.*, 370.
3. *Hines v. Jarrett*, 26 S. C., 480, from *Steele v. R. R. Co.*, 124
4. *McNeill v. Conyers*, 80 S. C. 571, from *Rigby v. Gaymon*, 489
5. *Power Co. v. Williams*, 85 S. C. 179, from *South Carolina Western Ry. v. Ellen*, 68.
6. *R. R. Co. v. R. R. Co.*, 57 S. C. 317, from *South Carolina Western Ry. v. Ellen*, 68.
7. *State v. Delyou*, 1 Bay 358, from *State v. Stone*, 390.
8. *Sturgiss v. R. R. Co.*, 80 S. C. 167, from *Beylot v. R. R.*, 210.

CASES OVERRULED.

1. *Blum v. Evans*, 10 S. C. 56, held to have been overruled by *Marshall v. Marshall*, 42 S. C. 436, in *Bischoff v. Atlantic Corporation*, 276.

CASTLE.

1. Where a defendant strikes while in his store, an instruction that the law of the castle does not apply, but that of the premises

may, is not error when this part of the charge is considered in connection with the entire charge. *State v. Ellison*, 127

CAUSES OF ACTION.

1. When demurrer by master in action for joint tort will not lie. *See Torts*, 1.

CHAIN GANG.

1. Under the proviso to sec. 957 of the Code of 1912, the county chain gang should not be worked as near as a town block to the employees of a road contractor, but as the status of the Codes is now before the Court for adjudication, this issue should be determined by the Court. *State v. Commissioners*, 463

CHARGE.

1. The beginning of a request "It appears" was properly changed to "If it appears" where the proof is not conclusive of the facts referred to. *Hill v. Ruggles*, 90
2. When the charge complained of is considered in its entirety it simply means that if as reasonable men the jurors reach the conclusion that the plea of self-defense is sustained by the preponderance of the evidence, they should acquit the defendant. *State v. Mattison*, 101
3. Where an error in a charge is patent a party may lose his right to except to it on appeal by not calling the attention of the Court to it. *Ibid.*
4. In view of the careful instruction by the Court in this case as to the crimes of murder and manslaughter and the degree of proof required in criminal cases, it was not error for the Judge to say to the jury at the close of his charge, their first duty was to enquire if the defendant had made out his plea of self-defense by the greater weight of the evidence. *State v. Ellison*, 127
5. Where a defendant strikes while in his store, an instruc-

- tion that the law of the castle does not apply, but that of the premises may, is not error when this part of the charge is considered in connection with the entire charge. *Ibid.*
6. The master practically received the benefit of his request covering the principle of the nonliability of the master when the foreman and men working with him are fellow servants. *Watts v. Cotton Mills*, 138
7. An instruction that defendant must have held the land for full ten years before the commencement of this action, May 10, is not a charge on the facts. *McLain v. Woodside*, 152
8. Where a plaintiff in laying the ground for contradiction by cross-examining the defendant's witness, the Judge says his statement now is more favorable to you (the plaintiff), and plaintiff's counsel assents thereto, there is no discussion of the evidence or charge on the facts. *Dimery v. R. R.*, 180
9. The portion of the charge here complained of as being on the facts is only an instruction that if county officers negligently placed a rope across a highway, the county would be liable. *Latimer v. County of Anderson*, 187
10. There was no request here to charge nor evidence to base, the doctrine of negligence of those engaged in a common enterprise, upon. *Ibid.*
11. There was no request to instruct the jury that a passenger in an automobile could not recover for injuries caused by the machine being negligently driven into an obstruction on a highway. *Ibid.*
12. Errors in misstating issues not called to the attention of the Court, and instructions on issues as to which there is no evidence are not considered on appeal. *Gamble v. Ins.*, 196
13. Where the evidence as to what the word "awning" means is conflicting, it would be a charge on the facts for the Judge to instruct that it included the frame and attachments because both are included under that term in the stock list. *Hurst v. Furniture Co.*, 221
14. Refusal to direct verdict on issue of wilfulness is cured by instruction that nobody claims there is any wilfulness in the case and that verdict could only be rendered for actual damages. *Thomason v. Mfg. Co.*, 239
15. Where a Judge gives in his charge the substance of every sound proposition of law requested, he cannot be charged with error in refusing a request. *Ibid.*
16. Where the Judge embodies in his general charge the substance of requests there is no error. *Tucker v. Cotton Mills*, 302
17. In giving a request it is the duty of the Judge to make clear in his own language or that of this Court in former decisions, what the principle of law embodied in the request is. *Magill v. Ry.*, 306
18. Failure to give a request that there was no special agreement to deliver a telegram, is held to have been harmless here as there was evidence tending to show a general waiver of office hours and because of the charge as to the burden of showing such agreement, and as to duty of jury to disregard the contention if there was no evidence to support it. *Robertson v. Tel. Co.*, 356
19. When failure to construe a receipt is not prejudicial. *See Contracts*, 1.
20. An appellant who fails to present a request on a point he thinks applicable to the case, should not complain if the Judge overlooks it. *State v. Malloy*, 441
21. In a case where the evidence warrants only a verdict for murder or an acquittal it is not a charge on the facts for the Judge to instruct that self-defense is the pivotal question in the case. *State v. Spears*, 488

22. An instruction that "the opinion of experts like any other testimony in the case must be weighed as other facts are considered" held to mean if the jury believe the testimony of an expert, they were not to disregard it. *State v. Malloy*, 441

CHATTEL MORTGAGES.

1. On crops has preference to right of landlord for advances. *See Mortgages*, 1.
2. When statute of frauds apply to. *See Mortgages*, 6.

CHILDREN.

1. Duty of engineer to protect when on track. *See Railroads*, 1.
2. When on industrial sidetrack. *See Railroads*, 6.
3. Are sidetracks attractive nuisances for? *See Nuisances*, 5.

CHURCHES.

1. Where the members of a church corporation are divided as to which faction is entitled to use the corporate name and control the property, the Courts are accustomed to enquire which party or division maintains the church organization as it existed before the division and to recognize that party. In all cases, except those in which complete or entirely peaceable possession is shown in the adverse faction, the Court will protect those adhering to the original organization in possession of the church property pending the litigation. *Middleton v. Ellison*, 158

CITIES AND TOWNS.

1. Any citizen of a city or town registered to vote at a general municipal election may vote on that registration at any intervening special election. The 20 day registration provided by sec. 221 of Code of 1912 before special elections is supplemental to the general registration. The terms of the certificate of registration as provided in sec. 225 of Code of 1912, cannot govern

the construction of sec. 221. *Logan v. Stanley*, 22

2. A resident of a city ward, who is a qualified elector for county elections, but who has not registered in the general municipal registration for the election at which he was elected alderman, is not qualified to hold the office in a city chartered under the general law for cities containing over 5,000 inhabitants. *State ex rel. Culp v. City Council of Union*, 131
3. In so far as the law affects this case the statute requiring cities and towns to keep the streets in repair are similar to those requiring county officers to keep the highways in repair. *Lattimer v. County of Anderson*, 187

CLAIM AND DELIVERY.

1. Where a defendant in a claim and delivery suit did not in the first instance obtain the possession of the property in question wrongfully, it is necessary to allege and prove demand before suit, and whether demand was made is usually for the jury. *Harby & Co. v. Byers Lumber Co.*, 83
2. The papers used in motion to vacate claim and delivery proceeding were not sufficiently definite. *Fairey v. Zeigler*, 170
3. The affidavit in claim and delivery on which the warrant was based, sufficiently sets forth the facts on which claim of plaintiff for possession of property was based. *Ibid.*
4. In claim and delivery right to possession may be shown by proof of chattel mortgage and of nonpayment of debt secured thereby. *Ibid.*
5. Damages for withholding possession of chattels need not be specifically alleged. *Ibid.*
6. That a mortgagee had instructed his agent to seize the mortgaged property, take it into an adjoining county and sell it, was not prejudicial to the rights of appellant here. *Ibid.*

7. Upon breach of conditions of chattel mortgage, title to the property mortgaged vests in mortgagee. *Ibid.*

CODE 1912 CONSTRUED.

1. Secs. 221 and 225 relating to registration for municipal elections, in *Logan v. Stanley*, 22
2. Sec. 957 relating to working chain gang in *State v. Commissioners*, 463
3. Sec. 2808 relating to relief department contracts in *Beylot v. R. R.*, 210
4. Sec. 3570 relating to wills of unmarried persons after marriage in *In re Will of Roton*, 118

COMMON SOURCE.

See Real Property, 11.

COMPLAINT.

1. Service of. *See Service*, 4.
2. Not "process." *See Process*, 1.

CONDEMNATION.

1. The proceeding prescribed by statute for condemnation of rights of way by railroad companies is a special statutory proceeding, not in the Circuit Court, but with right of appeal to that Court. *South Carolina Western Ry. v. Ellen*, 68
2. If the statute had provided no right of appeal to the Circuit Court, it would not have satisfied the constitutional provision that the "compensation shall be ascertained by a jury of twelve men, in a Court of record, as shall be prescribed by law," but the provision giving the Circuit Judge the right to judge of the sufficiency of the grounds of appeal, contravenes this constitutional provision. *Ibid.*
3. The corporation is not estopped from insisting that this provision is unconstitutional by invoking the statutory provision, in the first instance. *Ibid.*
4. The provision as to appeal is for the benefit and use of both the landowner and the corporation. *Ibid.*

5. For damages to riparian owner from accumulated mud and sand years after construction of dam the remedy by condemnation is not exclusive, but action may be maintained on the case in the Court of Common Pleas. *McDaniel v. Power Co.*, 268

CONFESSIONS.

See Evidence, 17, 22.

CONSTITUTIONAL LAW.

1. If the statute had provided no right of appeal to the Circuit Court, it would not have satisfied the constitutional provision that the "compensation shall be ascertained by a jury of twelve men, in a Court of record, as shall be prescribed by law," but the provision giving the Circuit Judge the right to judge of the sufficiency of the grounds of appeal, contravenes this constitutional provision. *Ry. v. Ellen*, 68
2. The corporation is not estopped from insisting that this provision is unconstitutional by invoking the statutory provision, in the first instance. *Ibid.*
3. The provision as to appeal is for the benefit and use of both the landowner and the corporation. *Ibid.*
4. Article II, section 13 of the Constitution, requiring a petition of the freeholders of a city or town as a condition precedent to an election for the issuance of bonds does not apply to a school district in an election for issuing bonds for school purposes whether the district is coterminous with the city limits included or not. *Burriss v. Brock*, 104
5. It is held that the legislature considered in the passage of the act of 28 Stat. 355 and provided that the old school district, including the city of Anderson and the new territory added thereto by this act, shall each bear its proportionate part of the taxes to pay the bonds already issued by the old school district and the additional ones

- provided therein for acquiring additional school property. *Ibid.*
6. Said act does not violate the provisions of subsections 4 and 9 of section 34 of article III of the Constitution prohibiting special laws for the incorporation of school districts and the enactment of special laws where a general law can be made to apply. *Ibid.*
 7. Nor does the act contravene the provisions of article III, section 17 of the Constitution, providing that each act shall relate to but one subject which shall be expressed in its title. *Ibid.*
 8. Nor does the act confer legislative power on the trustees by providing that the provision as to issuing bonds and enlarging the school buildings should only be put into effect, if the electors voted the amount of bonds and special tax. *Ibid.*
 9. The act of 1912, 27 Stat. 738, does not violate section 17 of article III of the Constitution in that the provision in the body of the act is that bonds and stocks may be issued to retire those in circulation while the title expresses the subject of providing for the exercise of the State's option in calling in certain bonds and stocks, as the provision in the body is germane to the subject expressed in the title. *State v. Blease*, 408
 10. Where there are two possible constructions of an act, one of them making its provisions consistent and the other inconsistent, the former should be adopted. Applying this rule to the act of 1912 the sinking fund commission under it has no authority to redeem Green Consols. Also if the act were so construed it would violate article III, section 17 of the Constitution. *Ibid.*
 11. Under the act of 1912, 27 Stat. 738, the commission has authority to refund Redemption Brown Consols, issued under the act of 1898, as that act was only amendatory to the act of 1892 on the same subject. *Ibid.*
 12. The following principles apply to the State in refunding its outstanding bonded debt: (1) The refunding of a valid existing debt does not increase the debt of the State, and needs not the sanction of the qualified electors which is required by section 11 of article X of the Constitution before the public debt can be increased. (2) The liability of the State upon negotiable paper, issued by competent authority, is the same as that which attaches to private individuals under like circumstances. (3) Holders of such paper in the absence of allegations to the contrary are presumed to be innocent purchasers for value before maturity and without notice of any objection to which it may be liable. (4) When authority to issue such paper exists neither irregularities nor frauds on the part of the officers or agents of the State who are entrusted with the exercise of such authority will affect it in the hands of such holders. (5) The State is estopped to deny recitals on the face of such paper in the hands of such holders. *State v. Blease*, 408
 13. The title of the joint resolution approved March 22, 1878, is sufficiently comprehensive to embrace in the body of the resolution the validation of the issuance of Green Consols by former officers of the State after their terms of office had expired. The State has the authority to authorize private individuals to issue bonds and to validate any irregularities in their issuance. *Ibid.*
 14. The title of the act of 1878 is broad enough to include the refunding of obligations of the State issued after January 1, 1866. *Ibid.*
 15. The act of 1912, 27 Stat. 702, changing capital punishment from hanging to electrocution, provides a more humane method

of inflicting the sentence and is not, therefore, an *ex post facto* law as to him who committed the crime of murder before its enactment and tried and sentenced since. *State v. Malloy*, 441

CONTRACTS.

1. Where the main issue was whether there was a substitute agreement, a failure on part of the trial Judge to construe a receipt connected with the transaction is not prejudicial. *McLester v. Barlow*, 25
2. Under section 2808 of Code 1912, the representatives of a beneficiary of a relief department of a railroad company may recover the amount of the relief benefit, after suing for, recovering and collecting judgment for his death, although the contract provides that suit on the injury shall invalidate the contract. *Beylot v. Atlantic Coast Line R. R. Co.*, 210

CONTRIBUTORY NEGLIGENCE.

See Negligence, 1, 11.

COSTS.

1. Where in claim and delivery a verdict is found for possession of the property and a special finding that defendant owed plaintiff a certain amount, and upon appeal by defendant that amount is reduced more than ten dollars, he is entitled to appeal costs. *Brown v. Kolb*, 217

CRIME.

1. Grafting is a crime. *See Grafting*, 1.

CROPS.

1. Landlord has no lien on for advances where land is part of wages paid servant. *See Mortgages*, 1.

CROSS-EXAMINATION.

1. On point objected to is not waiver of objection. *See Evidence*, 2.

CROSSINGS.

1. Running trolley cars over dangerous street crossings. *See Damages*, 1.
2. Crossing signals. *See Railroads*, 3, 4.

DAMAGES.

1. Evidence that trolley car was run rapidly over a dangerous crossing, an intersection of three streets, where school children were accustomed to cross, where the conductors have been instructed to stop the cars and where there was a signboard, "Cars Stop Here," that the crossing was dangerous, and the car was running rapidly, will support punitive damages. *Dodd v. Spartanburg Ry., Gas & Electric Co.*, 9
2. Damages for withholding possession of chattels need not be specifically alleged. *Fairey v. Zeigler*, 170
3. That a mortgagee had instructed his agent to seize the mortgaged property, take it into an adjoining county and sell it, was not prejudicial to the rights of appellant here. *Ibid.*, 170
4. A railroad company is not liable in punitive damages to consignor for collecting from the consignee of a car of logs the cost of putting in sufficient stakes to hold them in position on the car while in transportation. *Harvey v. Southern Ry.*, 201
5. The legislature has the power to grant a private corporation the right to build a dam across a navigable stream, but it has no power to release it from liability for damages to a riparian owner above accruing years after its erection from mud, sand and sediment accumulating in the pond. *McDaniel v. Greenville-Carolina Power Co.*, 268
6. Damages resulting from overcharges on an interstate shipment are not special. *Aldrich v. Sou. Ry. Co.*, 427

7. Measure of damages in such case is not the difference between the rate quoted and the correct rate. *Ibid.*
8. Mitigation of damages in slander cases. *See Slander, 4.*
9. Tenant may be liable for punitive damages in removing trade fixtures. *See Trade Fixtures, 2, 3.*

DAMS.

1. The legislature has the power to grant a private corporation the right to build a dam across a navigable stream, but it has no power to release it from liability for damages to a riparian owner above accruing years after its erection from mud, sand and sediment accumulating in the pond. *McDaniel v. Greenville-Carolina Power Co.*, 268
2. In such case the remedy by condemnation is not exclusive, but action may be maintained on the case in the Court of Common Pleas. *Ibid.*, 268

DECLARATIONS.

See Evidence, 2, 12.

DEEDS.

1. Where there is a breach of warranty and the grantor or executor intended to warrant the title individually, his estate is liable for damages arising from such breach. *Colclough v. Briggs*, 4
2. Where in a foreclosure complaint the land mortgaged is described as it is in the mortgage and the decree adjudges that the mortgaged premises described in the complaint be sold, but the description given at the foot of the decree as of the premises mortgaged is of a different tract of land, but the sheriff advertised the land as described in the mortgage and so described it in his deed, his deed conveys to the purchaser the land described in the mortgage. *McNair v. Johnson*, 176

3. The amount due for taxes is a debt due by the person listing the property for which he may be sued. A life tenant is required to assess the land in his possession as such and upon his default in paying taxes only his interest in the land can be sold under execution against him. *Taylor v. Strauss*, 295
4. The evidence here as to the execution and delivery of the deed in question warranted submitting the issue of execution and delivery to the jury. *Merck v. Merck*, 328
5. The doctrine of purchaser for value without notice can only be relied on by one claiming title from the same source as the plaintiff. The record of a deed is only notice to those claiming through the same grantor. *Smyly v. Colleton Cypress Co.*, 347
6. The timber contract in question construed to mean that if within ten years from its date, the grantee pay the grantor six per cent. per annum on the contract price the term for removing the timber may be extended for ten years. *Matheson v. Marion County Lumber Co.*, 352
7. Deed conveying land to B for life and at his death to his heirs in fee, carries to B a fee simple. *See Limitation of Estates, 1.*

DEMURRER.

1. Is not the proper remedy where pleading is so defective that it is uncertain in what capacity grantor meant to bind himself. *See Pleadings, 1.*
2. Demurrer by master to cause of action for joint tort by master and servant will not lie. *See Torts, 1.*

ELECTIONS.

1. In an election for issuing school bonds it is not required that more than one box be provided nor that the old and the section to be added should vote separately and a majority vote in

- each be required to carry the election. *Burris v. Brock*, 104
2. Registration requisite for municipal elections. *See Registration*, 1.

ELECTORS.

1. Registration requisite to vote in municipal elections. *See Registration*, 1.

ELECTRIC COMPANIES.

1. Evidence that an electric company built a house on the premises of a cotton mill for transforming electric power for the mill to which the cotton mill had the key but to which the electric company had free access and in which its agents were at work the day before an infant climbed up to a window left open on that day, reached its hand through the open window and touched the wires on the inside heavily charged with electricity, is sufficient to support a finding of negligence on the part of the electric company. *Hayes v. Southern Power Co.*, 230
2. Whether an open window to a transformer house where live wires are located is an attractive nuisance is for the jury. *Ibid.*, 230

ELECTROCUTION.

- See Constitutional Law*, 15.
- See Capital Punishment*, 1.

ESTOPPEL.

1. The corporation is not estopped from insisting that the provision in the condemnation statute as to appeal is unconstitutional by invoking the statutory provision, in the first instance. *Ry. v. Ellen*, 68
2. It is here found that respondent did not waive his right to insist upon the doctrine of estoppel of a grantor by his negligence in putting a deed after execution where the grantee could get it and record it from contending the deed was never delivered, which acts induced others to buy the land. Such acts amount to estoppel *in pais* and need not

be pleaded. Distinction between purchaser for value without notice and estoppel by negligence stated. *Merck v. Merck*, 328

EVIDENCE.

1. After stating the facts, a witness may give his opinion as to whether persons standing on a crossing could hear the gong of a trolley car while watching a freight train passing near. *Dodd v. Ry.*, 9
2. Error in the admission of evidence will not be considered where similar evidence was brought out without objection. *Ibid.*
3. Where parol evidence has been admitted without objection to prove an original and substituted agreement for the sale of stock, an exception that it was error to admit parol evidence to vary the terms of a receipt which defendant contended a memoranda under the statute of frauds is not considered. *McLester v. Barlow*, 25
4. In an action of slander statements made by defendant derogatory of plaintiff's character at times other than those alleged in the complaint is competent on the issue of malice. *Gill v. Ruggles*, 90
5. In such an action, after a witness has stated the words used by defendant he may give his opinion as to whether defendant was friendly to him. *Ibid.*
6. The declarations of one deceased as to his title to a tract of land is not admissible to show title in him when not made in the presence of one claiming title from him. That the witness was cross-examined as to the declarations is no waiver of appellant's objections. *Knight v. Knight*, 135
7. Where the master sets up the defense of injury by fellow servants in suit by servant against him for damages for injury, he must prove it by the greater weight of the evidence. *Watts v. Cotton Mills*, 188

8. It is competent for a witness to testify that he collected rent for deceased and paid it to him in an action by administrator of such deceased in aid of assets involving title to the land. *McLain v. Woodside*, 152
9. One not related to the family may testify as to his familiarity with the family and its connections and the reputation in the family as to its relations. *Ibid.*
10. In claim and delivery right to possession may be shown by proof of chattel mortgage and of nonpayment of debt secured thereby. *Fairey v. Zeigler*, 170
11. Whether the verdict is against the overwhelming preponderance of the testimony is for the Circuit Judge. *Gamble v. Ins. Co.*, 196
12. Statements made by one injured by a train of freight cars as soon after the injury as those near could get to him as to how he was injured are admissible as part of the *res gestae*. That declarant was dazed or shocked does not render the declarations incompetent, but only affect their weight. *Magill v. Southern Ry.*, 306
13. Error in admitting parol evidence as to the contents of a printed rule is cured by introduction of the rule. *Ibid.*
14. One conversant with the length of freight cars may testify as to their length and the distance they extend over the ends of the crossties, and such evidence is competent on the issue of injury caused by a freight car extending over the crossties. *Ibid.*
15. Affidavits of third persons that the governor of the demanding State had stated to affiants that he did not sign the requisition papers, should not be admitted to impeach the validity of the requisition. *Ex parte Massee*, 315
16. A telegram from the demanding governor to the asylum governor and one from this governor to the Court should be considered only as an inducement to continue the investigation until the demanding governor could formally declare his position. *Ibid.*
17. The confessions of one indicted with another for fornication is not evidence against the other. *State v. Wade*, 387
18. Letter of a carrier's agent quoting an incorrect rate on an interstate shipment is competent on the issue of damages for charging an incorrect rate. *Aldrich v. Sou. Ry. Co.*, 427
19. One knowing the market value of a commodity in a foreign market by his having been there, having sold the commodity there through others and accepting their reports of sales, may testify as to such value. *Ibid.*
20. Burden of proof is on master to show place was safe. *See Master and Servant*, 6.
21. An instruction that "the opinion of experts like any other testimony in the case must be weighed as other facts are considered" held to mean if the jury believe the testimony of an expert, they were not to disregard it. *State v. Malloy*, 441
22. The instruction here that a free and voluntary confession is competent evidence to be considered by the jury, as it was here given in a hypothetical sense, is not a charge on the facts. *Ibid.*
23. Possession of land may be proved by combining a number of substantive facts. *See Real Property*, 4.
24. Under a denial of an allegation in the complaint of a deficiency of acreage in a tract of land sold by the acre the defendant may prove the survey under which plaintiff claims the deficiency was incorrect. *Power Co. v. Cassels*, 465
25. It is incumbent on the plaintiff to show by the preponderance of the evidence that the shortage he claims in the acreage of a tract of land would not be made up by including the land under the water to the middle of the boundary stream in a suit for deficiency. *Ibid.*

26. The burden is on the carrier to show goods were destroyed by act of God and that it exercised due care to prevent the consequences. The Courts of this State do not follow the Federal rule as to the burden of proof in such cases. *Deaver-Jeter Co. v. Ry.*, 485

EXCEPTIONS.

1. An exception alleging error in a ruling not shown by the record to have been made is not well taken. *Colclough v. Briggs*, 4
2. Under an exception alleging error in finding so much due as principal, so much as interest and so much as attorney's fees on a note because so much was not due, the point that a note of payee should not have been adjudged to be secured by the mortgage in issue should not be considered. Office and form of exceptions stated. *Simpson v. Cox*, 382
3. Exceptions based on grounds not stated in record will not be considered. *State v. Malloy*, 441
4. Exceptions to the admission of evidence not shown to have been prejudicial to appellant will not be considered. *Ibid.*

EXECUTORS.

See Administrators and Executors.

EXCUSABLE NEGLECT.

1. Where a motion is made to set aside service of summons and to vacate judgment by default on ground of excusable neglect, the Court should find that judgment was obtained through excusable neglect of defendant, where it sets aside the service. *Klatte v. McKeand*, 219

EXPERT EVIDENCE.

See Evidence, 14, 21.

FALSE PRETENSE.

1. An indictment alleging that the defendant represented the horse he was trading to prosecutor to

be sound in every respect should not be quashed on the ground that this allegation does not state a fact but a mere opinion. When the fact of the unsoundness of a horse is certain and the party stating it to be sound knows of the unsoundness, and makes the statement with intent to cheat and defraud, it is a false representation. *State v. Stone*, 390

2. The evidence in this case sustains the verdict in that it is susceptible of the inference that the defendant in swapping horses with the prosecutor represented his horse to be sound, when he knew it was nearly blind, with intent to cheat and defraud. *Ibid.*

FEE DEFEASIBLE.

See Limitation of Estates, 3.

FELLOW SERVANTS.

See Master and Servant, 2, 3, 4.

FORECLOSURE.

See Mortgages.

FOREIGN INSURANCE COS.

See Insurance, 10.

FOREIGN LAWS.

1. The statute of N. C. extending the time of forfeiture in certain cases expressly exempts policies of a "term insurance for one year." *Wylie v. Jefferson Standard Life Ins. Co.*, 163
2. There being nothing in this case making the law of other jurisdictions germane to the issues and no proof of such laws, it was proper to refuse a request as to the effect of statutes of other jurisdictions relating to conflicting conveyances. *Bethea v. Allen*, 479

FORFEITURE.

1. Letter asking insured to pay past due premium is not a waiver of forfeiture. *See Insurance*, 1.

2. Forfeiture does not obtain if premium paid within extension. *See Insurance*, 8, 9.

FORNICATION.

1. The confessions of one indicted with another for fornication is not evidence against the other. *State v. Wade*, 387
2. Under a joint indictment against two persons for fornication, a severance in the trial and the verdict may be had. *Ibid.*

FRAUD.

1. If fraud was made an issue by the pleadings it was decided against defendant by the jury and not reviewable here. *Currence, Admr., v. Sovereign Camp Woodmen of the World*, 61

FREIGHT.

- See Carrier*, 1, 2, 3, 4, 5, 6, 7.
See Damages, 6, 7.

GRAFTING.

1. Grafting is the fraudulent acquisition of property by using official position for personal gain, and is the statutory crime of breach of trust with fraudulent intent in its worst form. *Gill v. Ruggles*, 90

HABEAS CORPUS.

1. The duty of the Court under writs of *habeas corpus* in extradition cases is simply to inquire if the requisitions of the Federal statutes have been met and pending that investigation bail should not be granted unless some departure from the Federal law has been made to appear. In such investigation the Courts of the asylum State should not inquire into the motive of the prosecution in the demanding State. *Ex parte Massee*, 315
2. Where requisition papers are regular on their face every intendment should be indulged in favor of their validity, but where the prisoner has made the *prima facie* showing that

they are not regular, he may be admitted to bail pending the final hearing. *Ibid.*

HARMLESS ERROR.

See Charges, 18.

HIGHWAYS.

1. Where there is evidence that one in charge of repairing a highway stretches a rope across the road some distance from the work which the driver of an automobile, looking ahead runs into without seeing it, and a passenger is injured, nonsuit was properly refused. *Latimer v. Anderson*, 187
2. Whether it is negligence to stretch a rope across a highway, without any other sign, to warn travelers that the highway is being repaired, is for the jury. *Ibid.*
3. The portion of the charge here complained of as being on the facts is only an instruction that if county officers negligently placed a rope across a highway, the county would be liable. *Ibid.*
4. There was no request here to charge nor evidence to base, the doctrine of negligence of those engaged in a common enterprise, upon. *Ibid.*
5. There was no request to instruct the jury that a passenger in an automobile could not recover for injuries caused by the machine being negligently driven into an obstruction on a highway. *Ibid.*
6. In so far as the law affects this case the statutes requiring cities and towns to keep the streets in repair are similar to those requiring county officers to keep the highways in repair. *Ibid.*

INDICTMENT.

1. Under a joint indictment against two persons for fornication, a severance in the trial and the verdict may be had. *State v. Wade*, 387
2. An indictment alleging that the defendant represented the horse he was trading to prosecutor to

be sound in every respect should not be quashed on the ground that this allegation does not state a fact but a mere opinion. When the fact of the unsoundness of a horse is certain and the party stating it to be sound knows of the unsoundness and makes the statement with intent to cheat and defraud, it is a false representation. *State v. Stone*, 390

INDUSTRIAL SIDETRACKS.

See Railroads, 6.

INJUNCTION.

1. Where the members of a church corporation are divided as to which faction is entitled to use the corporate name and control the property, the Courts are accustomed to enquire which party or division maintains the church organization as it existed before the division and to recognize that party. In all cases, except those in which complete or entirely peaceable possession is shown in the adverse faction, the Court will protect those adhering to the original organization in possession of the church property pending the litigation. *Middleton v. Ellison*, 158
2. A Circuit Judge should not dissolve a temporary injunction on motion on affidavits where doing so would require him to decide a question of fact. *Wilkins v. Lumber Co.*, 248
3. Where a right of way has been sold by the owner of a tract of land to another, he does not thereby relinquish his right to cross the right of way with another for his own convenience, when such crossing can be made so as not to interfere materially with the use of the right of way, and on such showing a temporary injunction should be dissolved. *Ibid.*

INSURANCE.

1. Where a policy of insurance, according to its terms and the

- receipt given for the premium, is forfeited by failure to pay the note given for the first premium when due, such forfeiture is not waived by the insurer writing after default, the following letter to the insured: "We are so disappointed at not hearing from you about premium note and interest past due since June 1st, that we are enclosing self-addressed envelope for reply from you saying why you have not attended to same. If we can help you by accepting part cash and extending note or make it easier for you in any other way please be free to express your views and we will give you prompt reply," which was not answered by insured. *Parry v. Ins. Co.*, 1
2. Where an insurer in answering a complaint on the policy admits the death of the insured and its liability, but alleges it does not know to whom the proceeds are due, it is not necessary to prove proofs of death were made. *Thompson v. The Equitable Life Assurance Society of the U. S.*, 16
 3. Where an insured in his lifetime complies with the requirements of the policy as to assignment, and delivers it to the assignee with a note to the insurer to indorse the assignment on the policy, who forwards both papers to the insurer, who receives them before the death of the insured, but does not enter the assignment until after his death, but before notice thereof, the rights of the assignee are paramount to those of the first beneficiary named in the policy. An insurance policy may be transferred by parol. *Ibid.*, 16
 4. An insurance policy on the life of a bankrupt, which has no cash surrender value and for which the insurer would have paid no money, at the time of adjudication of bankruptcy or prior to death of insured, which occurred while settlement of the bankrupt estate was pending

and before discharge, does not pass to the trustee by operation of law. *Sanders v. Aetna Life Ins. Co.*, 36

5. Where in such policy the power is given the insured to change the beneficiary without consent of insurer, such power does not pass to the trustee. *Ibid.*, 36
6. Nor do the proceeds of such policy belong to the trustee because the wife was adjudged a bankrupt as a partner with the insured, where she was discharged before the death of the husband bankrupt. *Ibid.*, 36
7. The acceptance by the Sovereign Camp of the Woodmen of the World of dues of a member of a local camp, after suspension for nonpayment, under the facts of this case, is some evidence of waiver by the Sovereign Camp of failure to file with the clerk of the local camp a certificate of good health when payment was made. *Currence, Admr., v. Sovereign Camp Woodmen of the World*, 61
8. A policy of life insurance containing a provision that the policy becomes void on failure to pay premiums when due is not forfeited within the extension by failure to pay a premium, notice of which is given in a letter stating that the company grants thirty days' extension with interest. *Wylie v. Jefferson Standard Life Ins. Co.*, 163
9. The statute of N. C. extending the time of forfeiture in certain cases expressly exempts policies of "a term insurance for one year." *Ibid.*, 163
10. There being no abuse of discretion on the part of the Insurance Commissioner in refusing to revoke the license of a foreign insurance company, or that it was capriciously or arbitrarily exercised on a rule to show why license should not be revoked for removing a case against it from the State into the Federal Court, the plaintiff in that case has no right to mandamus to require the commissioner to

revoke the license as he shows no injury from refusal to revoke. *State v. McMaster*, 476

ISSUES.

1. In a suit to sell land in aid of assets the Court has the authority to submit issues of title to a jury. *McLain, Admr., v. Woodside*, 152
2. A party may withdraw an abandonment of issues if it is done at a time that the other party could not be prejudiced thereby. *Batson v. Greenville & Knoxville Ry. Co.*, 206
8. Whether demand was made before suit in claim and delivery is for the jury. *See Claim and Delivery*, 1.
3. Of title is for jury. *See Real Property*, 1.
4. Whether it is negligence to stretch a rope across a road as the only sign it is being repaired is for the jury. *See Highways*, 2.
5. Whether the failure to give a crossing signal is wilful or inadvertent is for the jury. *See Railroads*, 4.
6. What issues as to trade fixtures are for the jury. *See Charges*, 18; *Trade Fixtures*, 1.
7. Whether an open window to a transformer house is an attractive nuisance is for the jury. *See Nuisances*, 3.
8. What evidence carries issues of negligence of the railroad company and contributory negligence of pedestrian to jury. *See Railroads*, 5.
9. Where evidence as to contributory negligence and assumption of risks is susceptible of more than one inference, those issues should go to the jury. *See Negligence*, 11.
10. Whether railroad company is guilty of negligence in running cars rapidly on industrial sidetrack is for jury. *See Railroads*, 6.
11. Issues of execution and delivery of deed sent to jury. *See Deeds*, 4.

12. When issues of negligence in running an engine across a street and of gross contributory negligence of employee on track should be sent to the jury. *See Railroads*, 8.

JOINT TORTS.

See Torts, 1.

JUDGMENT.

1. There being evidence here that the party served as agent of the corporation intended to be served was in fact not such agent, and no evidence to the contrary, the service and judgment by default were properly set aside and vacated. Request by defendant of extension of time to answer is not a waiver of no service. *Klatte v. McKeand*, 219
2. When judgment against one defendant in favor of his codefendant in foreclosure should be opened. *See Mortgages*, 8.

JURISDICTION.

1. This Court has no original jurisdiction to determine the title to an office on a petition and rule to show cause in less than twenty days, where the one in possession of the office demurs to the jurisdiction of the Court on the ground that the proper proceeding is by action. *State v. Tollison*, 58
2. The city recorder of the city of Sumter has no jurisdiction to try and sentence one for petit larceny. *Keels v. Sumter*, 208
3. This Court has no jurisdiction to set aside a verdict because excessive unless it is so excessive as to manifest capriciousness or fraud. *Robertson v. Tel Co.*, 356
4. The sinking fund commission is not subject to the control of the Court in matters within its discretion. *State v. Blease*, 408
5. The Court of Common Pleas has jurisdiction of an action to recover damages for overcharges

for an interstate shipment. *Aldrich v. Ry. Co.*, 427

6. The magistrate Court has jurisdiction of members of a partnership living in another county, if properly served, where one member of the firm lives in his county who is also properly served. That the resident in the magistrate's county has since the making of the contract sued on withdrawn from the partnership under a contract that the other members are liable for the debts, to which the plaintiff was not a party, does not oust the jurisdiction. *Strickland v. Strickland*, 492

JURORS.

1. No abuse of discretion having been shown in the Court in standing aside a juror who had been bound over as a witness for the defense by mistake and in allowing another to be presented who had formed an opinion from hearing the testimony at the inquest, exceptions thereto are overruled. *State v. Malloy*, 441
2. If appellant does not show abuse of discretion in trial Judge in standing aside and presenting jurors, exception thereto will not be considered. *State v. Vaughn*, 455
3. Where a defendant during trial withdraws his plea of *not guilty* he cannot afterwards insist on appeal that there was error in empanelling the jury. *Ibid*.

JUSTIFICATION.

1. Charge as to effect of failure to prove plea of, in slander case is not erroneous, where the answer was treated as setting up an unqualified plea thereof. *See Slander*, 3.

LANDLORD AND TENANT.

1. Landlord has no lien on crops of servant when. *See Mortgages*, 8.
2. Tenant may be liable in punitive damages for removing trade fixtures. *See Trade Fixtures*, 2, 3.

LARCENY.

1. The city recorder of the city of Sumter has no jurisdiction to try and sentence one for petit larceny. *Keels v. Sumter*, 208

LETTERS.

See Evidence, 18.

LICENSEE.

1. Duty of engineer to children on track as licensees. *See Railroad*, 1.

LIENS.

1. Landlord has no lien for advances on crops raised by servant on land given him to cultivate as part of his wages. *See Mortgages*, 1.

LIFE ESTATE.

See Limitation of Estates, 4.

LIFE TENANT.

1. Should pay taxes and in default only his interest can be sold. *See Taxes*, 1.

LIMITATION OF ACTIONS.

1. The act of 1896 limiting the time within which coupon bonds may be consolidated or refunded does not destroy the validity of such obligations, but only prevents the State Treasurer from refunding them after that time and the legislature by thereafter providing for refunding such obligations does not thereby increase the bonded debt of the State. *State v. Blease*, 408
2. Under a devise to A and B and in case A and B die, leaving no children, then over, the statute of limitation does not begin to run against remaindermen until the death of A and B. *Bethea v. Allen*, 479

LIMITATIONS OF ESTATES.

1. A deed conveying land to B "for and during the term of his natural life, and at his death to his heirs living at that time, in fee and not to be subject to

the debts, contracts and liabilities of the said B" vests in B a fee simple. *Browning v. Hoover*, 32

2. Under a devise to my wife "during her natural life and widowhood * * * and at her death or marriage, all the above mentioned property should be sold and equally divided between my three youngest children if living, if not living then to go back to my estate" upon the falling in of the life estate the land is vested in the youngest children surviving the life tenant as a class. *Dillard v. Dillard*, 86
3. In a will providing in one clause that "all the rest and residue of my real estate * * * I give and bequeath unto my beloved wife * * * that is to say during her natural life * * * and after her death * * * to be equally divided between my * * * children," naming them, and in the following clause: "In case any of our children should die and not leave any issue living then his or her share or part shall be equally divided between our children then living or their issue * * * the issue, if any, are entitled and receive the parent part," the word "then" in the last clause refers to the dying of the children of the testator at any time. Cases considered. *Bischoff v. Realty Corporation*, 276
4. A devise to L. during her natural life and at her death to the issue of her body and in case she should die leaving no such issue, then over, carries to L. only a life estate. *Still v. Creech*, 368

MAGISTRATE COURT.

1. Where an appeal from a magistrate Court has been on the docket in the Circuit Court for a general and special term of Court and the respondent has at each term endeavored to have it heard, the Court may on his motion dismiss the appeal at

the next regular term for want of prosecution. *Lykes v. Ry.*, 111

2. The magistrate Court has jurisdiction of members of a partnership living in another county, if properly served, where one member of the firm lives in his county who is also properly served. That the resident in the magistrate's county has since the making of the contract sued on withdrawn from the partnership under a contract that the other members are liable for the debts, to which the plaintiff was not a party, does not oust the jurisdiction. *Strickland v. Strickland*, 492

MANDAMUS.

1. There being no abuse of discretion on the part of the Insurance Commissioner in refusing to revoke the license of a foreign insurance company, or that it was capriciously or arbitrarily exercised on a rule to show why license should not be revoked for removing a case against it from the State into the Federal Court, the plaintiff in that case has no right to mandamus to require the commissioner to revoke the license as he shows no injury from refusal to revoke. *State v. McMaster*, 476

MARKET VALUE.

See Evidence, 19.

MARRIED WOMEN.

1. The will of an unmarried woman under section 8570, Code of 1912, is revoked by her subsequent marriage and her death leaving her husband surviving her, and such will will be declared invalid for all intents and purposes at the instance of the brother of the deceased. *In re Will of Roton*, 118

MASTER AND SERVANT.

1. Where a defendant, master, is sued on a several and joint tort, with his servant, charging a con-

current chain of negligent acts combining to produce an injury, demurrer on ground of misjoinder of causes of action by master will not lie. *Steele v. R. R.*, 124

2. Where the master places his servant under the control of another, that other is the representative of the master, and if he puts the servant to work at an unsafe place or directs him to do the work in a dangerous way, the master is liable to the servant for injury resulting therefrom. *Watts v. Cotton Mills*, 138
3. The master practically received the benefit of his request covering the principle of the non-liability of the master when the foreman and men working with him are fellow servants. *Ibid.*
4. Where the master sets up the defense of injury by fellow servants in suit by servant against him for damages for injury, he must prove it by the greater weight of the evidence. *Ibid.*
5. In deciding if motion for nonsuit was erroneously refused, this Court will consider all the evidence. Here there was evidence to show the place furnished by the master was not safe. *Thomason v. Mfg. Co.*, 289
6. Where it is shown a servant was injured because of a defective or unsafe place, the burden is then cast on the master to show he used due diligence in keeping the place reasonably safe and suitable. *Ibid.*

MINOR.

1. Infant under seven years of age cannot be held guilty of contributory negligence. *Dodd v. Ry.*, 9

MORTGAGES.

1. A landlord has no lien by statute for advances on crops raised by a servant on land given him to cultivate as a part of his wages, nor has he any lien which he can assert against a chattel mortgage on the crops

- duly indexed of which mortgagee had no notice. *Canty v. McClary-Broadway Co.*, 29
2. Where in a foreclosure complaint the land mortgaged is described as it is in the mortgage and the decree adjudges that the mortgaged premises described in the complaint be sold, but the description given at the foot of the decree as of the premises mortgaged is of a different tract of land, but the sheriff advertised the land as described in the mortgage and so described it in his deed, his deed conveys to the purchaser the land described in the mortgage. *McNair v. Johnson*, 176
 3. Where in a foreclosure one defendant seeks to foreclose his mortgage against his codefendant the note secured thereby not then being due without serving his answer upon his codefendant, upon the usual allegations in the complaint that such defendant claims some interest by mortgage, it is proper to open the judgment and permit the mortgagor to answer and defend. *Gibson v. Bethea*, 343
 4. In such case attorney's fee for defendant mortgagee should not be adjudged. *Ibid.*, 343
 5. Where one having a life estate in land gives a mortgage thereon which is marked paid in full by mortgagor and turned over to him for his benefit, those claiming title through the mortgagor cannot insist that the life tenant was in possession as mortgagee. *Bethea v. Allen*, 479
 6. Where one executes to a merchant an agricultural lien and chattel mortgage to secure advances of money or goods to be used in making a crop and he informs mortgagee that he wants thereunder certain articles of more than \$50 value and the mortgagee enters them on his books, but the memoranda is not signed by the mortgagor nor goods accepted by him, the statute of frauds applies. *Rigby v. Gaymon*, 489

MOTIONS TO MAKE DEFINITE.

1. Where the allegations in a complaint are so indefinite and uncertain as to leave it doubtful if the pleader intended to allege the grantor intended to bind himself individually or the estate of which he was trustee, by the covenant of warranty, the remedy is by motion to make the complaint definite and certain and not demurrer. *Colclough v. Briggs*, 4

MUNICIPAL ELECTIONS.

1. Registration for. *See Registration*, 1.

MURDER.

1. A provocation of mere words will not reduce a killing from murder to manslaughter. *State v. Ellison*, 127
2. Where the evidence in a murder case warrants only a verdict of guilty of murder or an acquittal, an instruction, "If the testimony satisfies you beyond a reasonable doubt that A killed B, then the burden shifts to A to explain it and to satisfy the jury that the law excuses him. Because nothing else appearing, and it appearing that one man killed another, the presumption is the killing was unlawful," is not error. *State v. Spears*, 438
3. In such a case it is not a charge on the facts for the Judge to instruct that self-defense is the pivotal question in the case. *Ibid.*

NAVIGABLE STREAMS.

1. The legislature has the power to grant a private corporation the right to build a dam across a navigable stream, but it has no power to release it from liability for damages to a riparian owner above accruing years after its erection from mud, sand and sediment accumulating in the pond. *McDaniel v. Greenville-Carolina Power Co.*, 268

2. By 5 Stat. 228, Saluda River is made a navigable stream to McElhaney's Ford. *Ibid.*, 268
8. In such case the remedy by condemnation is not exclusive, but action may be maintained on the case in the Court of Common Pleas. *Ibid.*, 268

NEGLIGENCE.

1. An infant under seven years is incapable of committing contributory negligence. *Dodd v. Ry.*, 9
2. It is the duty of an engineer in charge of a locomotive to use due care to prevent injury to children seen by him on the track in a perilous condition, whether they are licensees or trespassers. *Dimery v. R. R. Co.*, 180
3. Whether it is negligence to stretch a rope across a highway, without any other sign, to warn travelers that the highway is being repaired, is for the jury. *Latimer v. Anderson*, 187
4. In this case the charge was as explicit as the Court should have made it on the doctrine that failure to observe due care at a dangerous crossing at a time when the traveler had knowledge or ought to have known that a train was approaching, is gross negligence. *Batson v. Ry.*, 206
5. Whether a failure to give a crossing signal at a dangerous crossing is wilful or inadvertent is for the jury. *Ibid.*
6. Evidence that an electric company built a house on the premises of a cotton mill for transforming electric power for the mill to which the cotton mill had the key but to which the electric company had free access and in which its agents were at work the day before an infant climbed up to a window left open on that day, reached its hand through the open window and touched the wires on the inside heavily charged with electricity, is sufficient to support a finding of negligence on the part of the electric company. *Hayes v. Power Co.*, 280
7. One establishing a dangerous agency at a place where others are liable to be and have the right to be, must use due care in guarding it. *Ibid.*
8. Leaving a wire heavily charged with a current of electricity where a child may touch it may be the proximate cause of his injury caused by his touching it. *Ibid.*
9. Maintaining on one's property enticements to the ignorant and unwary is tantamount to an invitation to visit, inspect and enjoy the duty to protect from the dangers of the place follows as justly as if the invitation had been express. *Ibid.*
10. Evidence to the effect that a pedestrian was walking along a path beside a railroad track where people were accustomed to walk without objection from the company in a populous manufacturing community while the plants were in operation, the noise of which drowned the noise of the engine, that he stepped on the track to avoid some railroad iron left in the path by the company, that he was struck by an engine running backwards as he stepped on the track, that no signals were given as the engine approached, carries the issues of negligence of the railroad company and of contributory negligence of the pedestrian to the jury. *Horn v. R. R.*, 258
11. Where the evidence as to contributory negligence and assumption of risks is susceptible of more than one inference, those issues should be sent to the jury. *Tucker v. Cotton Mills*, 302

NEW TRIALS.

1. The discretion vested in the Circuit Court in deciding motions for new trials is not absolute or arbitrary but judicial and must be exercised on legal grounds. This Court will correct any manifest error in the exercise of such discretion. *Miller v. R. R.*, 471

2. While this Court has no jurisdiction to review orders in motions for new trials where they are based upon or involve issues of fact, yet when no ground is given in the order and the record shows any ground on which it can be based this Court will assume it was rested on such ground. Here the refusal of the motion is held to have been rested on issues of fact. Whether the evidence claimed to be "after discovered" was "after thought of" and whether it would lead any reasonable mind to conclude it would probably change the result. *Ibid.*

NONRESIDENT.

1. Service of, attending Federal Court. *See Summons*, 1.

NONSUIT.

1. There being sufficient evidence to carry the case to the jury and more than one inference deducible from the evidence, nonsuit and motion to direct a verdict was properly refused. *Knight v. Knight*, 135
2. In deciding if motion for nonsuit was erroneously refused, this Court will consider all the evidence. Here there was evidence to show the place furnished by the master was not safe. *Thomason v. Victor Mfg. Co.*, 289
3. Where the testimony tends to prove all the material allegations of the complaint, nonsuit is properly refused. *Tucker v. Cotton Mills*, 302

NOTES.

1. The maker of a note cannot set up the plea of usury in a suit by the payee of the third renewal for usurious interest paid to the bank which discounted the second renewal and received the usurious interest. *Simpson v. Cox*, 382

NOTICE.

1. A notice of motion to set aside a service of a summons stating

- that the movant lives in a certain city in a foreign State is sufficient suggestion to plaintiff of where defendant may be served. *Williams v. Hatcher*, 49
2. Of intention to appeal from order served out of term time. *See Appeal*, 15.

NUISANCE.

1. Evidence that an electric company built a house on the premises of a cotton mill for transforming electric power for the mill to which the cotton mill had the key but to which the electric company had free access and in which its agents were at work the day before an infant climbed up to a window left open on that day, reached its hand through the open window and touched the wires on the inside heavy charged with electricity, is sufficient to support a finding of negligence on the part of the electric company. *Hayes v. Southern Power Co.*, 280
2. Whether an open window to a transformer house where live wires are located is an attractive nuisance is for the jury. *Ibid.*
3. Maintaining on one's property enticements to the ignorant and unwary is tantamount to an invitation to visit, inspect and enjoy and the duty to protect from the dangers of the place follows as justly as if the invitation had been express. *Ibid.*
4. Where the testimony tends to prove all the material allegations of the complaint as to the maintenance of an unprotected pond in which a child of tender years was drowned, motions for nonsuit and direction of verdict on ground that there was failure to establish these allegations were properly refused. *Tucker v. Cotton Mills*, 302
5. While this Court is not prepared to hold that a pile of crossties is *per se* an attractive nuisance for children, yet the evidence as to the place in question and of the use made of it by children, warranted submit-

ting this issue to the jury.
Magill v. Southern Ry., 806

OFFICE HOURS.

1. There was sufficient evidence in this case to carry to the jury the issue of waiver of office hours. *Robertson v. Tel. Co.*, 356
2. Where there was evidence to the effect that the office hours at the receiving office had been habitually disregarded before the receipt of the message in question, the carrier cannot relieve itself of liability for failure to deliver on the ground that the telegram did not reach its destination until after office hours. *Ibid.*

OFFICES.

1. This Court has no original jurisdiction to determine the title to an office on a petition and rule to show cause in less than twenty days, where the one in possession of the office demurs to the jurisdiction of the Court on the ground that the proper proceeding is by action. *State v. Tollison*, 58
2. Membership in the sinking fund commission is not an office. The law creating the commission only devolves on certain officers specific duties. *State v. Blease*, 408
3. One not registered in city is not qualified to hold office of alderman. *See Registration*, 2.

OPINION EVIDENCE.

See Evidence, 1, 5.

PAROL EVIDENCE.

See Evidence, 3.

PARTIES.

1. The Court will not require an executor or administrator to be made a party defendant where such requirement would serve no useful purpose. *Thompson v. The Assurance Society*, 16

PARTNERSHIP.

1. Jurisdiction of partners. *See Jurisdiction*, 6.

PLEADINGS.

1. Where the allegations in a complaint are so indefinite and uncertain as to leave it doubtful if the pleader intended to allege the grantor intended to bind himself individually or the estate of which he was trustee, by the covenant of warranty, the remedy is by motion to make the complaint definite and certain and not demurrer. *Colclough v. Briggs*, 4
2. An answer alleging "the defendant * * * for a first defense alleges that it denies every allegation in the said complaint sustained and therein stated," is not frivolous. *Brand Shoe Co. v. Women's Wear Shop*, 35
3. A Circuit Judge has the power to permit an answer of a railroad company in a suit for damages for taking the soil of another, in which it claims the right to the soil, to be amended to set up that the soil was removed by an independent contractor as there is no abuse of discretion shown here. *Beck v. Northwestern R. R. Co.*, 339
4. When demurrer by master in action against him and servant for joint tort will not lie for misjoinder. *See Torts*, 1.
5. Where a defendant after going to trial on a plea of not guilty, withdraws the plea by statement of his counsel to the effect that the only issue to be referred to the jury was "recommendation to mercy," and it was so understood and acted upon by all the parties and the Court without objection, he cannot after verdict of "guilty" insist that the Court should not have permitted him to withdraw his plea without explaining to him its effect. Nor that the plea is not binding because not taken by the Court according to the rules of accepting pleas. *State v. Vaughn*, 455

6. Under a denial of an allegation in the complaint of a deficiency of acreage in a tract of land sold by the acre the defendant may prove the survey under which plaintiff claims the deficiency was incorrect. *Sou. Power Co. v. Cassels*, 465
7. Estoppel in pais need not be pleaded. *Merck v. Merck*, 828
8. What indictment charging false pretense should not be quashed. *See Indictment*, 2.

POLICY OF INSURANCE.

1. Assignment of. *See Insurance*, 8.

PRINCIPAL AND AGENT.

1. Where an agent of a telegraph company receives and transmits messages out of office hours in violation of the carrier's instructions, the carrier is liable, if the agent was acting within the scope of his employment. *Robertson v. Tel. Co.*, 856

PROCESS.

1. A complaint is a mere pleading and does not partake of the nature of "process." Process defined. *Royal Exchange v. R. R. Co.*, 375

PROOFS OF DEATH.

See Insurance, 2.

PROXIMATE CAUSE.

See Negligence, 8.

PUNITIVE DAMAGES.

See Damages, 1, 4.

PURCHASER FOR VALUE.

1. Distinction between purchaser for value and estoppel by negligence stated. *Merck v. Merck*, 828
2. Who can rely on plea of. *See Deeds*, 5.

RAILROADS.

1. It is the duty of an engineer in charge of a locomotive to use

due care to prevent injury to children seen by him on the track in a perilous condition, whether they are licensees or trespassers. *Dimery v. R. R.*, 180

2. A railroad company is not liable in punitive damages to consignor for collecting from the consignee of a car of logs the cost of putting in sufficient stakes to hold them in position on the car while in transportation. *Harvey v. Ry.*, 201
3. In this case the charge was as explicit as the Court should have made it on the doctrine that failure to observe due care at a dangerous crossing at a time when the traveler had knowledge or ought to have known that a train was approaching, is gross negligence. *Batson v. Ry.*, 206
4. Whether a failure to give a crossing signal at a dangerous crossing is wilful or inadvertent is for the jury. *Ibid.*
5. Evidence to the effect that a pedestrian was walking along a path beside a railroad track where people were accustomed to walk without objection from the company in a populous manufacturing community while the plants were in operation, the noise of which drowned the noise of the engine, that he stepped on the track to avoid some railroad iron left in the path by the company, that he was struck by an engine running backwards as he stepped on the track, that no signals were given as the engine approached, carries the issues of negligence of the railroad company and of contributory negligence of the pedestrian to the jury. *Horn v. R. R.*, 263
6. Whether a railroad company was negligent in running a train of freight cars over an industrial sidetrack rapidly, where children were accustomed to be and where the company had left a pile of crossties piled near the track irregularly in violation of its rules on or near which a

- child was struck and injured, and whether the train came in without proper lookout, were issues under the evidence here for the jury. *Magill v. Ry.*, 306
7. While this Court is not prepared to hold that a pile of crossties is *per se* an attractive nuisance for children, yet the evidence as to the place in question and of the use made of it by children, warranted submitting this issue to the jury. *Ibid.*
 8. When there is evidence that a switch engine was run across a street in a city at a reckless rate of speed, greater than permitted by the rules of the company without a proper lookout and without warning, and that these acts were the proximate cause of the death of an employee on the tracks and the defense introduces evidence tending to show the injured person was guilty of gross contributory negligence in attempting to cross the track, the issues should have been sent to the jury and not determined by the Court on motion for nonsuit. *Mims v. R. R.*, 370
 9. Condemnation of right of way; appeal; constitutionality of act. *See Condemnation*, 1, 2, 3, 4.
 10. Beneficiary of relief department contract may sue after collecting benefit. *See Contracts*, 2.
 11. There being evidence in the magistrate Court to support the findings that a carrier unlawfully withheld from consignee a shipment and charged thereon unlawful storage, which findings were concurred in by the Circuit Court, the judgment below will not be disturbed. *Owens v. Charleston & Western Carolina Ry. Co.*, 437
- REAL PROPERTY.
1. There being some evidence in this case of a seizure by the plaintiffs or those through whom they claim within the statutory periods and of title from a common source, the issue of title should have been sent to the jury, and nonsuit not granted. *Stokes v. Murray*, 120
 2. The declarations of one deceased as to his title to a tract of land is not admissible to show title in him when not made in the presence of one claiming title from him. That the witness was cross-examined as to the declarations is no waiver of appellant's objections. *Knight v. Knight*, 135
 3. Where the issues referred involve title to land, findings by referee are not reviewable in this Court. *Alderman v. McKnight*, 245
 4. Possession of land may be proved by a number of facts and circumstances, neither of which might show possession alone, but all of which considered together would satisfy the jury which is the tribunal to try such issue. *Smyly v. Cypress Co.*, 347
 5. In a suit to sell land in aid of assets, the Court may submit issues of title to the jury. *McLain v. Woodside*, 132
 6. Variance between description in deed and decree of foreclosure. *See Mortgages*, 2.
 7. Life tenant should assess and pay taxes and in default only his interest can be sold. *See Taxes*, 1.
 8. Where a nonnavigable stream is a boundary of a tract of land the middle of the stream is the line and to ascertain the number of acres in the tract the survey should go to the middle of the stream. *Sou. Power Co. v. Cassels*, 465
 9. Where the owner and vendor of a tract of land is present at one survey which did not include the stream to the middle, he cannot be said to have waived his right to insist that the resurvey should have gone to the middle of the stream, especially when he insisted that should have been done when he heard of the claim of shortage. *Ibid.*
 10. It is incumbent on the plaintiff to show by the preponderance of the evidence that the shortage

he claims in the acreage of a tract of land would not be made up by including the land under the water to the middle of the boundary stream in a suit for deficiency. *Ibid.*

11. When both parties claim land from a common source, the defendant cannot take advantage of any defect in title in the common source. *Bethea v. Allen*, 479

RECEIPT.

1. When failure to construe, held not prejudicial. *See Contracts*, 1.

RECORDING DEEDS.

See Deeds, 5.

REGISTRATION.

1. Any citizen of a city or town registered to vote at a general municipal election may vote on that registration at any intervening special election. The 20-day registration provided by sec. 221 of Code of 1912 before special elections is supplemental to the general registration. The terms of the certificate of registration as provided in sec. 225 of Code of 1912, cannot govern the construction of sec. 221. *Logan v. Stanley*, 22
2. A resident of a city ward, who is a qualified elector for county elections, but who has not registered in the general municipal registration for the election at which he was elected alderman, is not qualified to hold the office in a city chartered under the general law for cities containing over 3,000 inhabitants. *State ex rel. Culp v. City Council of Union*, 181

RELATIONSHIP.

1. Proof of. *See Evidence*, 9.

RELIEF DEPARTMENT CONTRACTS.

See Contracts, 2.

REQUESTS.

See Charge, 15, 16, 17.

REQUISITION.

1. The requisition papers in this case are held to comply with the requirements of the Federal statutes. The objection that the certificate of the clerk of the Tennessee Court is to the effect that there is no indictment except what appears in the Court minutes is untenable. *Ex parte Massee*, 815
2. The duty of the Court under writs of *habeas corpus* in extradition cases is simply to inquire if the requirements of the Federal statutes have been met and pending that investigation bail should not be granted unless some departure from the Federal law has been made to appear. In such investigation the Courts of the asylum State should not inquire into the motive of the prosecution in the demanding State. *Ibid.*, 815
8. Where requisition papers are regular on their face every intendment should be indulged in favor of their validity, but where the prisoner has made the *prima facie* showing that they are not regular, he may be admitted to bail pending the final hearing. *Ibid.*, 815
4. Should bail be given in extradition proceedings without notice to the State? *Ibid.*, 815
5. Affidavits of third persons that the governor of the demanding State had stated to affiants that he did not sign the requisition papers, should not be admitted to impeach the validity of the requisition. *Ibid.*, 815
6. A telegram from the demanding governor to the asylum governor and one from this governor to the Court should be considered only as an inducement to continue the investigation until the demanding governor could formally declare his position. *Ibid.*, 815
7. The validity of extradition proceedings should not be adjudged without the presence of the body of the prisoner before the Court,

whether he is on bail or not.
Ibid., 315

RES GESTAE.

See Evidence, 12.

RIGHT OF WAY.

1. Where a right of way has been sold by the owner of a tract of land to another, he does not thereby relinquish his right to cross the right of way with another for his own convenience, when such crossing can be made so as not to interfere materially with the use of the right of way, and on such showing a temporary injunction should be dissolved. *Wilkins v. Lumber Co.*, 248
2. Right of appeal from condemnation verdict. *See Condemnation*, 1, 2, 3, 4.

RULE.

1. When title to office should not be determined on rule. *See Offices*, 1.

RULE OF MASTER.

1. Error in admitting parol evidence as to the contents of a printed rule is cured by introduction of the rule. *Magill v. Ry.*, 306

SAFE PLACE.

See Master and Servant, 2, 5, 6.

SALUDA RIVER.

1. By 5 Stat. 223, Saluda River is made a navigable stream to McElhaney's Ford. *McDaniel v. Power Co.*, 268

SCHOOL DISTRICTS.

1. Article II, section 13 of the Constitution, requiring a petition to an election for the issuance of bonds does not apply to a school district in an election for issuing bonds for school purposes whether the district is co-terminous with the city limits included or not. *Burris v. Brock*, 104
2. The legislature may authorize the trustees of a school district

to hold an election on issuance of bonds for school purposes without a petition from electors or freeholders. *Ibid.*

3. It is held that the legislature considered in the passage of the act of 28 Stat. 355 and provided that the old school district including the city of Anderson and the new territory added thereto by this act shall each bear its proportionate part of the taxes to pay the bonds already issued by the old school district and the additional ones provided therein for acquiring additional school property. *Ibid.*
4. In such election it is not required that more than one box be provided nor that the old and the section to be added should vote separately and a majority vote in each be required to carry the election. *Ibid.*

SELF-DEFENSE.

1. When the charge complained of is considered in its entirety it simply means that if as reasonable men the jurors reach the conclusion that the plea of self-defense is sustained by the preponderance of the evidence, they should acquit the defendant. *State v. Mattison*, 101
2. In view of the careful instruction by the Court in this case as to the crimes of murder and manslaughter and the degree of proof required in criminal cases, it was not error for the Judge to say to the jury at the close of his charge, their first duty was to enquire if the defendant had made out his plea of self-defense by the greater weight of the evidence. *State v. Ellison*, 127

SERVICE.

1. A nonresident does not submit himself to the jurisdiction of the Court by employing resident counsel to move to dismiss service because the Court has thereby acquired no jurisdiction of his person. *Williams v. Hatcher*, 49

2. A foreign attorney coming into this State to attend to the trial of a case here is exempt from service of process while in this State on that business. *Ibid.*, 49
3. There being evidence here that the party served as agent of the corporation intended to be served was in fact not such agent, and no evidence to the contrary, the service and judgment by default were properly set aside and vacated. Request by defendant of extension of time to answer is not a waiver of no service. *Klatte v. McKeand*, 219
4. The service of a complaint by mail, where the summons has been served regularly without the complaint, is good, if it is deposited in the postoffice on the twenty-first day after demand for service when the twentieth day falls on Sunday. *Royal Exchange v. R. R.*, 375
5. Of summons on nonresident attending Federal Court is not good. *See Summons*, 1.
6. When acceptance of service of summons by attorney for nonresident is not waiver of right to move to set it aside. *See Summons*, 2.
7. What is sufficient notice to set aside service of summons. *See Summons*, 8.

SEVERANCE.

See Fornication, 2.

SIDETRACKS.

See Railroads, 6.

SINKING FUND COMMISSION.

1. The sinking fund commission is not subject to the control of the Court in matters within its discretion. *State ex rel. Ray v. Blease, Governor*, 403

SLANDER.

1. In an action of slander statements made by defendant derogatory of plaintiff's character at times other than those alleged

in the complaint is competent on the issue of malice. *Gill v. Ruggles*, 90

2. In such an action, after a witness has stated the words used by defendant he may give his opinion as to whether defendant was friendly to him. *Ibid.*
3. The answer in this case having been treated by plaintiff and the Court as an unqualified plea of justification and the Court so having treated it in his charge without the defense having called his attention to a misstatement of the issues and the answer being much involved, the defendant will not now be heard to say the instruction of the Court as to the effect of failure to prove the plea of justification was erroneous. *Ibid.*
4. In an action of slander, the jury may consider in mitigation of damages whether the defendant made the statements on information which he believed to be true. *Ibid.*

STATUTE OF FRAUDS.

1. Where one executes to a merchant an agricultural lien and chattel mortgage to secure advances of money or goods to be used in making a crop and he informs mortgagee that he wants thereunder certain articles of more than \$50 value and the mortgagee enters them on his books, but the memoranda is not signed by the mortgagor nor goods accepted by him, the statute of frauds applies. *Rigby v. Gaymon*, 489

STATUTES.

1. When there are two possible constructions of an act, one of them making it consistent and the other inconsistent, the former should be adopted. *State v. Blease*, 403

STATUTES AT LARGE CONSTRUED.

1. 5 Stat. 223, relating to navigability of Saluda River, in *McDaniel v. Power Co.*, 268

2. 27. Stat. 702, relating to electrocution, held constitutional in *State v. Malloy*, 441
3. 27 Stat. 788, relating to refunding the State debt in *State v. Blease*, 408
4. 28 Stat. 855, relating to bonds in school districts. *See Constitutional Law*, 6, 7, 8.

STORAGE.

See Carriers, 9.

STREAMS.

1. Damages to riparian owner by accumulation of mud and sand years after building dam. *See Navigable Streams*, 1.
2. As boundaries. *See Real Property*, 8, 9, 10.

SUIT MONEY.

See Alimony, 1.

SUMMONS.

1. A nonresident attending the Federal Court sitting in this State as a party and witness in a case there being tried is exempt from service of summons and complaint in the Federal courtroom. State statutes and laws do not apply to such case. *Granite Brick Co. v. Titus*, 47
2. Waiver may be sometimes presumed from conduct; but where a nonresident by his attorneys requests service of complaint on them reserving all rights, and they serve notice of motion to strike from the complaint, which motion was abandoned, it is held the nonresident did not thereby waive the right to move to set aside the service on him in this State while attending Court to testify and assist in conducting a case in this Court as attorney for a nonresident client. *Williams v. Hatcher*, 49
3. A notice of motion to set aside a service of a summons stating that the movant lives in a certain city in a foreign State is sufficient suggestion to plaintiff of where defendant may be served. *Ibid.*

4. Service of summons on agent of corporation set aside. *See Service of Summons*, 219.

SUMTER.

1. The city recorder of the city of Sumter has no jurisdiction to try and sentence for petit larceny. *Keels v. Sumter*, 208

TAX DEEDS.

See Deeds, 8.

TAXES.

1. The amount due for taxes is a debt due by the person listing the property for which he may be sued. A life tenant is required to assess the land in his possession as such and upon his default in paying taxes only his interest in the land can be sold under execution against him. *Taylor v. Strauss*, 295

TELEGRAM.

1. In requisition proceedings. *See Evidence*, 16.

TELEGRAPH COMPANIES.

1. There being evidence here that a death message to be transmitted forty miles on one wire was delayed on day received for two hours before close of office hours at office of destination and other business in meantime given preference, the issue of wilfulness was properly sent to the jury. *Bethoa v. Tel. Co.*, 166
2. Where an agent of a telegraph company receives and transmits messages out of office hours in violation of the carrier's instructions, the carrier is liable, if the agent was acting within the scope of his employment. *Robertson v. Tel. Co.*, 856
3. Where there was evidence to the effect that the office hours at the receiving office had been habitually disregarded before the receipt of the message in question, the carrier cannot relieve itself of liability for failure to deliver on the ground that the telegram did not reach its destination until after office hours. *Ibid.*

4. Failure to give a request that there was no special agreement to deliver a telegram, *is held* to have been harmless here as there was evidence tending to show a general waiver of office hours and because of the charge as to the burden of showing such agreement, and as to duty of jury to disregard the contention if there was no evidence to support it. *Ibid.*
5. Charge as to duty of telegraph company to receive and deliver messages and to use reasonable care and diligence to have them delivered notwithstanding trouble with its operators, and that the message was received out of office hours, is free from error. *Gossett v. Tel. Co.*, 397

TIMBER CONTRACTS.

See Deeds, 6.

TITLE.

See Real Property, 3, 5.

TORTS.

1. Where a defendant, master, is sued on a several and joint tort, with his servant, charging a concurrent chain of negligent acts combining to produce an injury, demurrer on ground of misjoinder of causes of action by master will not lie. *Steele v. R. R. Co.*, 124

TRADE FIXTURES.

1. Whether an attachment to a building by a tenant for purposes of trade is to be regarded as a trade fixture is a mixed question of law and fact and depends on the intention of the parties. *Hurst v. Craig Furniture Co.*, 221
2. An outgoing tenant may be liable in punitive damages for removing fixtures put on a building while he occupied it for trading purposes. *Ibid.*
3. Where an outgoing tenant attempts to remove his trade sign from a building by a reckless use of paint, the jury may infer he did it wilfully. *Ibid.*

TRANSACTIONS WITH DECEDENTS.

See Evidence, 8.

TRESPASSERS.

1. Duty of engineer to children on track as trespassers. *See Railroads*, 1.

TROLLEY CARS.

See Damages, 1.

USURY.

1. The maker of a note cannot set up the plea of usury in a suit by the payee of the third renewal for usurious interest paid to the bank which discounted the second renewal and received the usurious interest. *Simpson v. Cox*, 382

VALIDATION.

See Bonded Debt of the State, 2.

VERDICT.

1. There being sufficient evidence to carry the case to the jury and more than one inference deducible from the evidence, nonsuit and motion to direct a verdict were properly refused. *Knight v. Knight*, 185
2. This Court has no jurisdiction to set aside a verdict because excessive unless it is so excessive as to manifest capriciousness or fraud. *Robertson v. Tel. Co.*, 856
3. Where the evidence tends to prove the material allegations of the complaint, motion for verdict properly refused. *See Nuisance*, 4.

WAIVER.

1. The acceptance by the Sovereign Camp of the Woodmen of the World of dues of a member of a local camp, after suspension for nonpayment, under the facts of this case, is some evidence of waiver by the Sovereign Camp of failure to file with the clerk of the local camp a certificate of good health when

- payment was made. *Currence v. Sovereign Camp*, 61
2. There being evidence here that the party served as agent of the corporation intended to be served was in fact not such agent, and no evidence to the contrary, the service and judgment by default were properly set aside and vacated. Request by defendant of extension of time to answer is not a waiver of no service. *Klatts v. McKeand*, 219
 3. It is here found that respondent did not waive his right to insist upon the doctrine of estoppel of a grantor by his negligence in putting a deed after execution where the grantee could get it and record it from contending the deed was never delivered, which acts induced others to buy the land. Such acts amount to estoppel *in pais* and need not be pleaded. Distinction between purchaser for value without notice and estoppel by negligence stated. *Merck v. Merck*, 326
 4. There was sufficient evidence in this case to carry to the jury the issue of waiver of office hours. *Robertson v. Tel. Co.*, 356
 5. Where there was evidence to the effect that the office hours at the receiving office had been habitually disregarded before the receipt of the message in question, the carrier cannot relieve itself of liability for failure to deliver on the ground that the telegram did not reach its destination until after office hours. *Ibid.*
 6. Letter asking for payment of past due premiums is not waiver of forfeiture. *See Insurance*, 1.
 7. What is not waiver of right to move to dismiss service on non-resident. *See Summons*, 2; *Service*, 1.
 8. Cross-examination on point objected to is not waiver of the objection. *See Evidence*, 2.
 9. Where a defendant after going to trial on a plea of not guilty, withdraws the plea by statement of his counsel to the effect that

- the only issue to be referred to the jury was "recommendation to mercy," and it was so understood and acted upon by all the parties and the Court without objection, he cannot after verdict of "guilty" insist that the Court should not have permitted him to withdraw his plea without explaining to him its effect. Nor that the plea is not binding because not taken by the Court according to the rules of accepting pleas. *State v. Vaughn*, 455
10. Where the owner and vendor of a tract of land is present at one survey which did not include the stream to the middle, he cannot be said to have waived his right to insist that the resurvey should have gone to the middle of the stream, especially when he insisted that should have been done when he heard of the claim of shortage. *Sou. Power Co. v. Cassels*, 465

WILFULNESS.

- See Telegraph Cos.*, 1.
See Trade Fixtures, 2, 3.
See Charge, 14.

WILLS.

1. The will of an unmarried woman under section 3570, Code of 1912, is revoked by her subsequent marriage and death leaving her husband surviving her, and such will will be declared invalid for all intents and purposes at the instance of the brother of the deceased. *In re Will of Roton*, 118
2. A devise of L. during her natural life and at her death to the issue of her body and in case she should die leaving no such issue then over, carries to L. only a life estate. *Still v. Creech*, 368
3. Under what will the devise vests in youngest children surviving life tenant. *See Limitation of Estates*, 2.
4. What will passes fee defeasible. *See Limitation of Estates*, 3.

WORDS AND PHRASES.

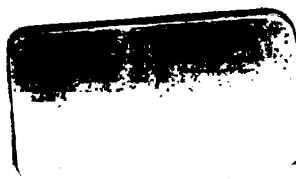
1. Where the evidence as to what the word "awning" means is conflicting, it would be a charge on the facts for the Judge to instruct that it included the frame and attachments because

both are included under that term in the stock list. *Hurst v. Furniture Co.*, 221

WRITTEN INSTRUMENTS.

1. When failure to construe a receipt is held not prejudicial. *See Contracts*, 1.

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